

OCT 26 1918

JAMES D. MAHER,  
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Nos. 277, 329, 330, 353.

# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF  
KANSAS *et al.*, Appellants,

*vs.*

JOHN M. LANDON, as Receiver of the Kansas Natural Gas Com-  
pany, *et al.*

No. 277. Filed September 20, 1917.

KANSAS CITY, MISSOURI, THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI *et al.*, Appellants,

*vs.*

JOHN M. LANDON, Receiver of The Kansas Natural Gas Company  
*et al.*

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GEORGE F. SHARITT, Receivers, and FIDELITY TITLE AND  
TRUST COMPANY.

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SAS *et al.*, Appellants,

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JOHN M. LANDON, as Receiver of the Kansas Natural Gas Com-  
pany, *et al.*

No. 353. Filed February 6, 1918.

*Appeals from the District Court of the United States for the  
District of Kansas.*

## REPLY BRIEF OF APPELLANTS THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS.

FRED S. JACKSON,

*Attorney for the Appellants, The Public  
Utilities Commission for the State of  
Kansas, and the appellant cities of  
the State of Kansas.*

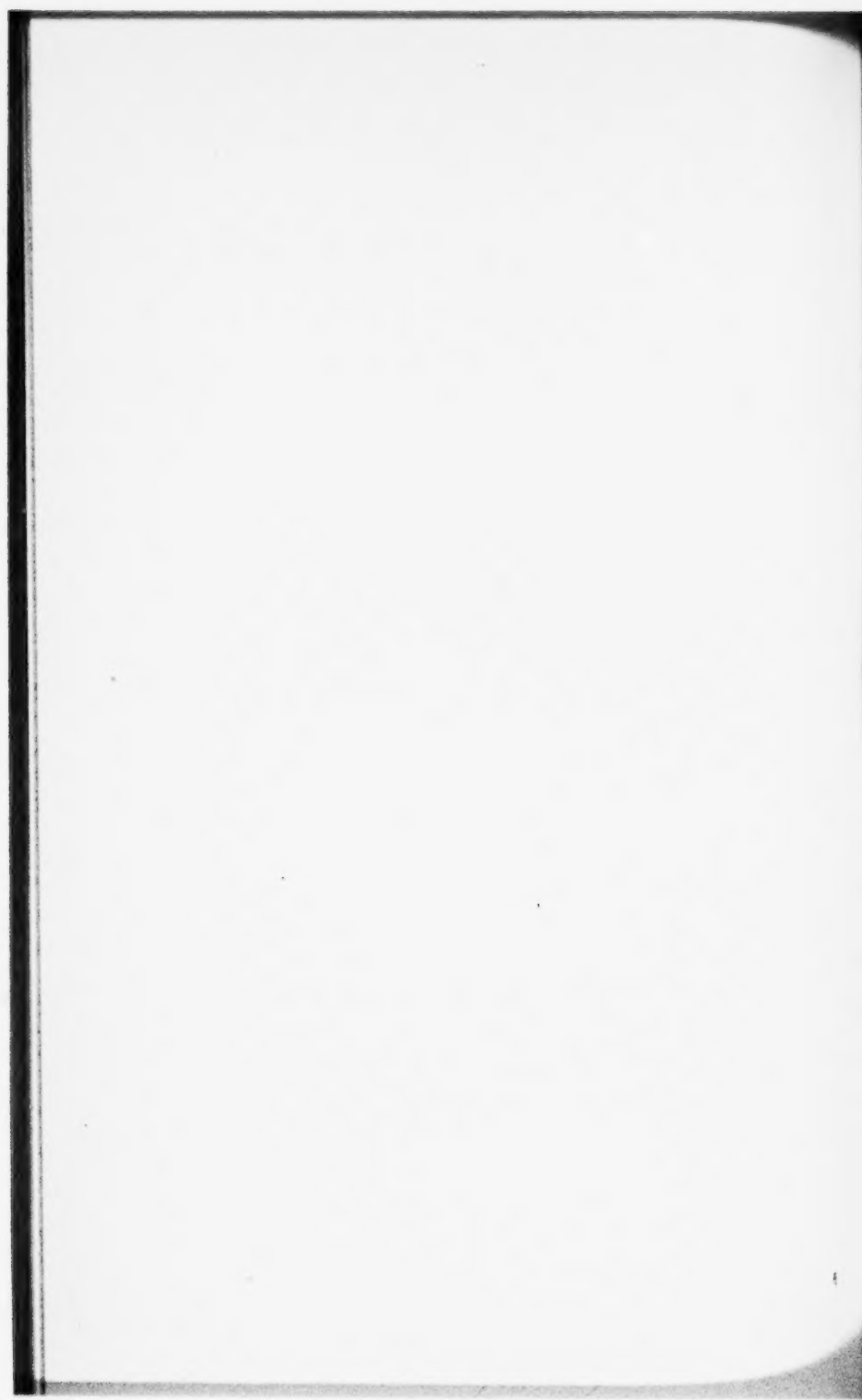


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## REPLY BRIEF OF APPELLANTS

THE PUBLIC UTILITIES COMMISSION FOR THE  
STATE OF KANSAS.

## STATEMENT.

The appellant, for the convenience of the court and to prevent the possibility of mistake in examining the record, desires to call attention to several errors in statements of fact and decisions occurring in the brief of the appellees, John M. Landon, Receiver, Fidelity Title and Trust Company, Kansas Natural Gas Company, and George F. Sharitt, Receiver of the Kansas Natural Gas Company, hereinafter referred to as appellees.

### I.

On page 5 of said brief, relative to the opinion of Judge Marshall in *Fidelity Title and Trust Company v. Kansas Natural Gas Company*, 219 Fed. 614, the following statement is made:

"Judge Marshall held that the extensions were to be made in Oklahoma, *that the business of the receiver was interstate commerce*, and therefore the whole subject was beyond the jurisdiction of the Public Utilities Commission of Kansas, and directed the receiver not to make the extensions."

Judge Marshall did not make such holding or statement. He did hold that the transportation of gas from Oklahoma into Kansas was interstate commerce, but did not hold that the whole subject was beyond the jurisdiction of the Public Utilities Commission. On the contrary, Judge Marshall found specifically as follows:

Syllabus 2. "Where a foreign corporation admitted to do business in a state and engaged in the business of obtaining supplies of natural gas, transporting it by pipe lines to various cities in such state and other states and selling it to local public service corporations or manufacturing plants, though granted the right of eminent domain, was not by any specific contract or charter provision granted an exclusive right so as to imply a contract to supply the full needs of those depending on it, *while, so far as it availed itself of the permission granted it by the state, its property was affected by a public interest, its use*

*of the property was subject to valid state regulation, and it could not, with respect to property devoted to this quasi-public service, abandon that service, it could not be compelled by the state Public Utilities Commission to extend its lines to new gas fields so as to constantly furnish an adequate supply of gas."*

In the opinion, p. 617, Judge Marshall stated :

"The state, because of the public interest, has the power to prescribe reasonable rates for gas sold and to secure the efficiency of the service by reasonable regulations, and it is not to be doubted that a receiver of the property of the corporation must operate it in accordance with valid state laws in respect thereto.

*"The action of the state was only permissive. The company was not obligated to build any pipe line or furnish any gas. So far as it availed itself of this permission, its property used for the quasi-public service was affected by the public interest, and its use of the property in this business was subject to valid state regulation, but it did not become a mere agency of the state, and was under no obligation, contractual or other, to increase its investment or build new lines."*

It is apparent, therefore, that instead of Judge Marshall holding that the whole subject of the receiver's business was beyond the jurisdiction of the Commission, he sustained fully the contentions of the appellant in this case; that is, he held that the sale and distribution of gas within Kansas by the appellees was a local business of public interest, transacted by virtue of the state's police regulations and authority, subject to state control. He refused to enforce the order of the Commission solely because the extensions ordered were located outside of Kansas, beyond the authority of state laws, and the order concerned that part of the transaction, the conveyance of gas from one state to another, which every one admits is interstate commerce.

## II.

Concerning the decision of the supreme court of Kansas, *In re Flannelly*, 96 Kan. 372, on page 6 of appellees' brief the statement is made:

"The supreme court also held there was no order of the Public Utilities Commission outstanding which should be enforced, and denied the writ of mandamus."

The writ was not denied in that decision, except as to Judge Flannelly. As to the receivers of the Kansas Natural Gas Company, jurisdiction was retained "for such orders and judgment as may be hereafter made."

## III.

In appellees' brief, p. 10, the statement is there made that the supreme court of Kansas in the case of *In re Flannelly*, 96 Kan. 837, held that:

"The United States district court of Kansas was a court of competent jurisdiction to determine the reasonableness of the rate established by the Commission and had jurisdiction of this suit."

The court did not so hold. The only reference made to the case then pending in the United States district court in the opinion in the Flannelly case was as follows:

"At the hearing of the application for removal it was conceded that the receivers had complied with the order of the Commission and had put into effect the rate fixed by the order of December 10, 1915. The fact that they are seeking by the suit in the federal court to enjoin the rate as confiscatory and unreasonable makes no difference. They have the right to question the reasonableness of the rate established by the Commission and to choose the forum where that question shall be adjudicated."

The Kansas court did not decide that the receivers had chosen the proper forum, and did not attempt to decide for the federal court that there was equity in the receivers' bill of complaint or in his cause.

## IV.

In appellees' brief, p. 16, the following statement is made there:

"The Kansas Natural Gas Company and its receivers have never been parties to any of the franchises granted to local distributing companies, nor have its receivers ever adopted the terms, if any, of the franchises."

The bill of the appellees (rec. 43-44) alleges that the franchises were made with the distributing companies by the cities with the view that the distributing companies should be supplied with gas by a transportation company, and "that by reason thereof one of said franchises under which a large percentage of the total supply and distribution of natural gas was undertaken by the Kansas Natural Gas Company and *these complainants*, expressly provides as follows."

And again, in said bill on said page, the following allegation is made:

"That all of said ordinances are passed by said cities and accepted by said distributing companies with full knowledge of the foregoing facts and the conditions and provisions of said supply contracts."

Exhibit B, attached to the bill of complaint of the appellees, is entitled, "Rates provided by franchises in principal cities supplied by Kansas Natural Gas Company and rates in effect prior to December 10, 1915." It is also averred in the bill of complaint of the appellees (rec. 14):

"That the receivers after their appointment immediately qualified and took possession of all the properties of the Kansas Natural Gas Company in the states of Oklahoma, Kansas and Missouri, and thereafter carried on the business theretofore conducted by the Kansas Natural Gas Company of producing, purchasing, distributing and selling natural gas to the people of Kansas and Missouri."

Of course it must be conceded that both the supreme court of Kansas and the United States district court, in the opinion from

which this appeal is taken, specifically found that the receiver was operating, at the time the order of the Commission was made and at the time this suit was begun, under the local franchises. If this were not true (rec. 1113) there would be no basis at all for the claim made by the receiver that the fixing of rates at the meters' tips was a part of interstate commerce. The question of whether the court has since set aside these contracts as inoperative or inequitable as to rates is another proposition.

### V.

Appellees' brief 18-19. The statement is here made that the supreme court of Kansas, in *State, ex rel., v. Flannelly*, 96 Kan. 372, held the 28-cent rate void, that it was admittedly too low, and would not be enforced by the court. At the time the opinion in that case was rendered the 28-cent rate had not been made by the Commission, and was therefore not in existence. On pages 18 and 19 occurs the same misstatement as to the opinion of Judge Marshall in *Fidelity Title and Trust Company v. Kansas Natural Gas Company*, 219 Fed. 614, referred to in this brief in paragraph I, and *State v. Flannelly*, 96 Kan. 833, referred to in this brief in paragraph III.

## ARGUMENT.

### INTERSTATE COMMERCE.

A chain is no stronger than its weakest links. There are several links in the theory of the appellees on the question of interstate commerce that are manifestly so weak that the entire argument falls. Without attempting to reargue the propositions contained in our first brief, we call attention to some of these points as expressed in the brief of the appellees.

#### FIRST.

*As to the attempt of the appellees to show that the use of franchise rights (brief, p. 56) does not change the claimed interstate character of appellees' business.*

A good part of this section of appellees' brief is taken up by a discussion of the proposition that local agencies do not change the character of an interstate business. This is equivalent to arguing that the employment of an agent by the importer to transact his business does not change the character of his business, and one which will readily be acceded to by every one. But the question of the importer obtaining the right to transact a business local in its nature by the authority of and under the benefits of the local law is not touched upon by the appellees except to argue that the question was settled in *West v. Natural Gas Co.*, 221 U. S. 229, and in *Western Union Telegraph Co. v. Foster*, 38 Sup. Ct. 438, denominated the Ticker Cases. The question of the use of local franchises to transact a local business was not involved in either case. In the *West* case the question was one of the right of the exporter to purchase and transport to another state natural gas produced in one of the states of the Union. The use of the highways or of other means of transportation was no more than that used by any railroad company which is engaged in an interstate business. The argument of the appellees in this case, as in several others, is based upon the wrong end of the trip or export jour-

ney. We think it well settled that the exporter has a right within the state to use any means legally at hand for the purpose of gathering, collecting or fitting for export the commodities sought to be transported to another state, and that the entire transaction is a part of interstate commerce. But this does not mean that the transaction may not become intrastate commerce after the importation has reached its destination, or even before then, if the exporter wills to and does commingle his property with the general mass of property in the state into which the importation is made. He may accomplish this by employing local franchises for that purpose. As was said by Judge Marshall, in *Fidelity Title and Trust Co. v. Kansas Natural Gas Co.*, *supra*: "It is not to be doubted that a receiver who is operating a property devoted to a quasi-public service and affected by public interest is subject to valid state regulation." (*l. c.* 617.) In announcing this doctrine Judge Marshall was merely adopting the law as announced by his illustrious namesake, Chief Justice John Marshall, in *Brown v. Maryland*, which is discussed in our brief at page 75, and relates to the duties and obligations of the importer who avails himself of privileges granted by local authorities. We have there cited the authorities which sustain this view.

#### THE TICKER CASES.

Local franchise rights were not involved in this case, although this seems to be asserted in numerous places in the brief of the appellees. While some of the telegraph companies involved in that litigation did cross the public highways with their lines, it is specifically found by the court that the telephone companies were not engaged in a public business in the transactions involved in transporting the messages of the stock exchange to the ticker customers in Massachusetts. While this case seems to be the star case of the appellees, they completely overlook the main proposition of the case, which is stated in the foregoing sentences. To restate it, the entire case turned

upon the proposition that the information collected from the quotations made up from the transactions of the New York Stock Exchange constituted the exchange's private property. This was the doctrine of the *Christie Grain Case*, 198 U. S. 236. Therefore, the stock exchange could sell this information or keep it, as it desired. The contracts made in the case under consideration specifically provide that this information should not be transported to any one without the consent of the New York Stock Exchange. Every contract made by the local agency was to be approved by the exchange, and all persons prohibited from receiving the information unless the consent of the exchange was first received. This provision of the contracts nullified the idea of a general retail business or a general distribution of the information to the inhabitants of the state of Massachusetts, and negatived, as well, any possibility of a plea of the business being one clothed with a public interest. The service of the Western Union Telegraph Company and the Postal Company and their subsidiaries and local agents thus became the mere private acts of the exporter, the New York Stock Exchange, in protecting its property. The lines of these companies were employed merely for such private purpose. These points being established, all other points in the case became subsidiary, and, as the court said, "of no importance." On the other hand, if the brokers or the telegraph companies had possessed the right, under the contracts made with the New York Exchange, to sell the information indiscriminately under the local laws and under local franchises and regulations obtained under the authority of the state of Massachusetts, an entirely different rule would have obtained, and the transaction would have been more nearly in line with the instant case. The court says:

"Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the exchange."

We think this is all that needs to be said about this case under the consideration of this proposition or any other involved herein.

## SECOND.

*The Mixing of Intrastate and Interstate Natural Gas in the Pipe Line within the State of Kansas.* Appellees' Brief, 120.

This part of appellees' brief also fails to furnish any answer to the self-evident proposition that the willful commingling of the property of the importer with the local property of the state changes the interstate character of the shipment, if one existed, to that of a local character and constituted the entire mass of property of the importer "property within the state subject to state control." The authorities cited by the appellees, as well as those cited by the trial court, to sustain the contrary proposition are all either railroad cases, express or telegraph cases. In each of these cases the question involved was whether the use of the instrumentality used for transportation at one time for intrastate business destroyed its interstate character when used at another time for interstate business. There was no commingling of the property involved in any of these cases. They are enumerated on page 121 of appellees' brief. The same proposition was discussed ably and fully by this court in the *Minnesota Rate Case*, and of course there is no room for difference of opinion upon that point.

## THE IMPORTER'S RIGHT OF SALE.

As the appellees are in error in the foregoing propositions, so they are equally in error in their attempted announcement of the doctrine of the right of the importer to sell. Speaking of our position on this subject (appellees' brief, p. 54) they say:

"Their misconceptions are premised on their failure to recognize the fact that the interstate commerce clause of the federal constitution protects not only the transportation of the articles in interstate commerce, but its sale *after the completion of its journey.*"

How long *after* the completion of the journey does this right to sell abide with the importer? How long is he exempt from the operation of the local laws which apply to other people—one day, two months, five years? Is there one rule which applies to property which had its origin outside of the state, and another which applies to property produced in the state, when all are commingled together with the general mass of property in the state?

There is absolutely no authority for the position of the appellees. The right to sell free from state control is bound up with the purposes of the importation and ends with the importation, and must always fall short of any act of the importer which would commingle his imported property with the general mass of property in the state. Nor does the use of the term by the courts that when the property is "at rest" at its destination necessarily mean that the property must have reached actual physical rest. The appellees attempt to make much of the alleged fact that the gas is moved as rapidly on its journey as science can accomplish its transportation. They seem to think that if the importation is still in motion that it cannot be said to be legally at rest for the purpose of general distribution in the state. This is also error. The importer may have chosen a method of moving his importation for the very purpose of commingling it with the general property of the state. The words of Chief Justice Marshall in *Brown v. Maryland* guaranteed the importer exclusive control of his importation and the right to sell up to the point of commingling his property, but not afterward.

To illustrate: If in the Rhoads case, 188 U. S. 1, relied upon by the appellees (brief, p. 65), the owner of the sheep driving them from Utah through Wyoming to Nebraska had begun selling sheep at retail to any person who sought to buy, or, as the courts express it, by a subsequently made contract, an entirely different rule would have been applied by the court from the one which obtained to exempt the property in ques-

tion from local taxation in Wyoming. Or again, if in the Lipscomb case, 244 U. S. 346 (appellee's brief, p. 99), the oil had been sold from the tank car in Tennessee at any station after the car had entered the state, by general or retail sale, and not delivered upon orders previously taken, to persons who were prepared to receive the same in the exact quantities contracted for previous to the shipment, the importer would have been held to have been conducting a general business in the state of Tennessee and his property subject to taxation and the other local laws of that state.

This point is squarely decided in a case which is decisive of every proposition involved in this lawsuit and should settle once for all the contentions of the appellees. We refer to the case of *Brown v. Houston*, 114 U. S. 622. In that case coal was imported into Louisiana in much the same manner that the oil was transported in the Lipscomb case, except that the means of transportation of the coal was by flatboats "and was on said boats on which it had just arrived and afloat on the Mississippi river; that it was held by Brown and Jones to be sold for account of the plaintiffs (the importers) by the boatload, and that since then more than half of it had been exported from this country on foreign steamships and the balance of it sold into the interior of the state for plantation use by the flatboat load." The question decided was whether the coal was subject to local taxation, and the court said (p. 632) :

"It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. *It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest for final disposition or use and was a commodity in the markets of New Orleans.* It might continue in that condition for a year, or two years, or only for a day. It had become a part of the general mass of the property in the state, and as such it was taxed for

the current year, as all other property in the city of New Orleans was taxed."

Again, in the case of *Emmett v. The State of Missouri*, 156 U. S. 296, this court held that:

"A statute of a state requiring every peddler to procure a license and pay a tax therefor, and imposing a penalty for peddling without a license, is not repugnant to the power given Congress to regulate commerce as applied to a peddler, within the state, of sewing machines made in another state by a corporation of that state and sent by it to him to sell on its account and as its agent."

In this case, of course, there is involved an additional proposition—that of the right of the state to regulate the business of hawkers or of general peddlers. But there is also involved the proposition that although the sewing machine had been intended at the time of its shipment by the importer from the state of its manufacture for "ultimate delivery to a customer," by its agent in the state of importation, still it must be held that the sales were general sales which accomplished a comingling of the property with the general mass of property in the state.

The case of *Standard Oil Company v. The City of Fredricksburg*, 52 S. E. 817, was a similar one, and the supreme court of appeals of that state followed the foregoing authorities and the *Speed* case, 192 U. S. 508. The facts in that case were as follows: A corporation engaged in the sale of oil brought its oil from a foreign state into Virginia to its storage tanks, and from these it was pumped into a tank wagon of several hundred gallons' capacity, and from this wagon the company's local agent disposed of the oil to regular customers while the wagon was standing in front of or near the customer's door, the oil being paid for to said local agent, and that new customers would be supplied after first receiving their request for oil and the company or agent satisfying itself or himself that the new customer was a desirable addition to

the number of regular customers, and that the company was also a seller of other articles brought into the state by it, intended to be inducive to a larger sale and consumption of its oils. The court held that while the plaintiff oil company was not a merchant, as that term is generally understood, yet it was not engaged in selling oil in the state either in original barrels or from wagons engaged in interstate commerce in such sense as to preclude a city of the state from exacting a license tax upon it.

Both the appellees and the trial court seem to regard it as of some importance that there is what is termed a divergence of view between the supreme court of Kansas and the Public Utilities Commission as to the point at which interstate commerce ceases and local business begins (appellee's brief, p. 41). This arises from the fact that the supreme court referred to the entire pipe line as the original package of gas, while the Public Utilities Commission in its briefs has asserted that there can be no original package for the transportation of gas. We regard this as but another way of expressing the same idea; that is, that gas can not be transported into the state for sale in an original package. The Kansas supreme court meant the same thing when it said that the only possible original package was the pipe line itself. That is to say, if the entire pipe line filled with gas could be brought into the state as one sale it would constitute the only original package possible in the transportation of gas. The appellees themselves say the same (brief, p. 47):

"Natural gas does not come in packages, hence there is no place for the short name for the rule found by the courts in other cases to be convenient. The rule, of course, extends as much to a commodity not capable of confinement in a package as to an article that is, and the importer of natural gas has a right to enjoy the freedom given to him by the constitution just as much as the importer of intoxicating liquor; that is, he has the right to sell it without regulation and without interference by state authorities."

The answer, of course, to this last proposition of the appellees is that the importer does not have a right under the constitution to sell free from state control after his importation ceases. He may sell under such guarantee *at* but *not after* the destination is reached, if he sell the importation as a whole, or if he sell a part of the importation in original packages suitable to the necessities of commerce. Or he may deliver during the journey of importation from the bulk of his commodities without destroying the interstate character of the shipment, if it be done upon orders or contracts previously made for a definite portion of the shipment. But, as many times stated heretofore, the moment he undertakes to enter upon a general sale of the property imported, by contracts entered into subsequent to the beginning of the shipment, then his act amounts to a distribution of his property and a commingling of the same with the mass of property subject to state control.

The trial court attempted to answer the difficulty thus confronting the gas company in its attempt to make the local distribution of gas appear to be an interstate transaction by saying that the applications for gas to the local company became in effect orders for gas, and this statement of the trial court is seized upon by the appellees as a happy solution of their problem. But there is nothing in the transaction or the facts as found by the trial court that warrants this conclusion. The receiver or the transporting company had nothing whatever to do with selecting the customers for the distributing company. They were attached to the local pipe line or detached at the will of the distributing company and the local authorities. There was nothing that compelled them to take more or less gas from day to day than they had taken the day before. At best they could be called nothing more than "regular customers" after their meters and pipe lines had been constructed to receive gas from the local company. Indeed, not only the transportation company was denied the right to select its customers, but even

the local distributing company was compelled to serve the public generally under the local law and by reason of the fact that it was engaged in a public business. This fact alone forbids the transaction from being considered as an order within the meaning of that term as applied to interstate commerce.

We respectfully pray, therefore, that the judgment of the trial court be reversed and that the appellants take such relief in the premises as this court may direct and award.

Respectfully submitted.

FRED S. JACKSON,

*Attorney for the Appellants, The Public  
Utilities Commission for the State of  
Kansas, and the appellant cities of  
the State of Kansas.*



FILED

OCT 30 1918

JAMES D. BAKER

CLERK

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*Appeals from the District Court of the United States for the  
District of Kansas:*

## BRIEF ON BEHALF OF VARIOUS DISTRIB- UTING COMPANIES, APPELLEES.

LEONARD S. FERRY,  
THOMAS F. DURAN,  
M. F. COGGROVE,

*Solicitors for L. G. Trele-  
von, Receiver of The Con-  
sumers Light, Heat and  
Power Company of Topeka,  
Kansas.*

J. M. CHALLIS,

*Solicitor for The Atchison  
Railway, Light and Power  
Company of Atchison,  
Kansas.*

FLOYD HARPER,

*Solicitor for The Leaven-  
worth Light, Heat and  
Power Company of Leaven-  
worth, Kansas.*



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## BRIEF

ON BEHALF OF L. G. TRELEAVEN, RECEIVER OF THE CON-  
SUMERS LIGHT, HEAT AND POWER COMPANY, OF  
TOPEKA, KANSAS, THE ATCHISON RAILWAY, LIGHT  
AND POWER COMPANY, OF ATCHISON, KANSAS, AND  
THE LEAVENWORTH LIGHT, HEAT AND POWER COM-  
PANY, OF LEAVENWORTH, KANSAS.

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## STATEMENT OF FACTS.

The above named distributing companies, on  
whose behalf this statement is filed, hereby approve  
and adopt the Statement of Facts presented on

behalf of John M. Landon, Managing Receiver of The Kansas Natural Gas Company, Fidelity Title and Trust Company, The Kansas Natural Gas Company, and George F. Sharritt, Receiver of The Kansas Natural Gas Company, appellees; and hereby request the Court to consider in addition thereto those portions of the record hereto annexed as Appendix A, which were by accident or mistake omitted from the printed record. The transcript of the original instruments, in which they are found, was duly transmitted to the clerk of this Court and will be found in his files. The facts relative to their omission from the printed record, in so far as known to the distributing companies on whose behalf this statement is filed, are set forth in the affidavit attached to Appendix A.

### ARGUMENT.

The distributing companies on whose behalf this statement is filed hereby approve and adopt the arguments and authorities cited in the briefs, both original and supplemental, on behalf of John M. Landon, Managing Receiver of The Kansas Natural Gas Company, Fidelity Title and Trust Company, The Kansas Natural Gas Company, and George F. Sharritt, Receiver of The Kansas Natural Gas Company, and respectfully request that the judgment and decree of the lower court be sustained on the grounds:

*First.* That the rate established by the Public Utilities Commission of the State of Kansas, designated as the 28-cent rate, is unremunerative and confiscatory, and wasteful and destructive of the property and estate of the distributing companies presenting this brief.

*Second.* That the business of the Receiver of The Kansas Natural Gas Company, the Kansas Natural Gas Company, and of the distributing companies upon the lines of the Kansas Natural Gas Company, as carried on and conducted, is interstate commerce and free from state or municipal control.

*Third.* The distributing companies presenting this statement believe that the arguments and authorities cited, and herein approved and adopted, are conclusive, and that an extended brief on behalf of the distributing companies would burden the Court, lead to useless repetition, and encumber the record.

These distributing companies, therefore, respectfully submit that upon all the facts and authorities cited the judgment of the lower court should be affirmed.

Respectfully submitted,

LEONARD S. FERRY,

THOMAS F. DORAN,

M. F. COSGROVE,

*Solicitors for L. G. Treleaven,  
Receiver of The Consumers  
Light, Heat and Power Com-  
pany, of Topeka, Kansas.*

J. M. CHALLISS,

*Solicitor for The Atchison Rail-  
way, Light and Power Com-  
pany, of Atchison, Kansas.*

FLOYD HARPER,

*Solicitor for The Leavenworth  
Light, Heat and Power Com-  
pany, of Leavenworth, Kansas.*

## **Appendix "A."**

### **AFFIDAVIT.**

*State of Kansas, Shawnee County—ss.*

T. F. Doran, of lawful age, having been first duly sworn, upon oath says:

That he is one of the attorneys for L. G. Treleaven, Receiver of the Consumers Light, Heat and Power Company, of Topeka, Kansas; that upon the appeal of the case of *John M. Landon, Receiver, et al., v. The Public Utilities Commission of the State of Kansas*, being In Equity No. 136-N, of the court below, counsel for said appel-

lant duly served upon affiant, as attorney for L. G. Treleven, Receiver of the Consumers Light, Heat and Power Company, the following praecipe, setting out the portions of the record appellant desired to have incorporated in the transcript:

"In the District Court of the United States  
for the District of Kansas, First Division.  
John M. Landon, *et al.*, Receivers,  
vs. In Equity,  
The Public Utilities Commission No. 136-N.  
of the State of Kansas *et al.*

**PRAECIPE OF THE APPELLANTS.**

Filed under Rule 8 of the Supreme Court of the United States.

Come now the appellants, in pursuance of Rule 8 of the Supreme Court of the United States, and for the purpose of enabling the clerk to prepare the record for the appeal herein from the decision of the District Court to the Supreme Court, hereby requests the clerk to incorporate the portions of the record into the transcript of the record on such appeal which are hereinafter indicated, to-wit:  
*Pleadings:*

The following parts of the bill of complaint, to-wit:

The title page, caption, and first ten lines of paragraph or division I thereof.

Also paragraphs or divisions III, V, VII, VIII, IX, X, XI, XII, XIII, XV, XVI, XVII, XVIII, XIX, XX, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, and the prayer.

And that there be included also the following exhibits to said bill:

Exhibits A, B, C, F, K and M.

And that of the answer of the Public Util-

ities Commission for the State of Kansas and H. O. Caster, its attorney, there be included in the record the following portions, to-wit:

The title page and opening statement, and of Part I, paragraphs IV, V and VI; of Part II, paragraphs III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XV, XVI, XVII, XVIII, XIX, XX, XXVIII, XXIX, XXX and XXXIII; and that of Part III there be included paragraphs I, II, III, IV and V, and the last sentence of paragraph VI, page 55 of said answer, and also paragraphs VII and VIII; and that of the exhibits to said answer that there be included Exhibits B and C.

That of the supplemental bill of complaint the following parts, to-wit:

The opening statement, omitting caption and including paragraph I, also paragraphs XI, XII, XIII, XIV, XV, XVI and XIX, and the prayer of said supplemental bill. That of the exhibits attached to said supplemental bill there be included Exhibits No. 15 and 16.

That of the answer of the Public Utilities Commission of Kansas to said supplemental bill of complaint there be included:

Paragraph I and paragraphs XI, XII and XIII.

That of the amended answer of the Wyandotte County Gas Company there be included in said transcript the following parts, to-wit:

Paragraph XI on page 15, XII and XIII on pages 16 and 17, and the prayer of said amended answer, and that none of the exhibits be included.

That the amended and supplemental answer of L. G. Treleaven, Receiver of Consumers Light, Heat and Power Company, be included in said transcript, and that of the

exhibits there be included Exhibits A, B, C, D and E, and that all other exhibits be not included.

That there also be included the answer of the Kansas Natural Gas Company, the answer of George F. Sharritt, Receiver, and the answer of the Fidelity Title and Trust Company.

*Evidence:*

That there be included in the transcript of the evidence the statement of evidence prepared under Rule 75 in this cause.

*Opinions:*

That there be included in said transcript the opinion of the court on the temporary injunction and on final hearing.

*Appeal and Allowance:*

That there be included in said transcript the assignments of error of the appellant, the appeal and allowance thereof by the court, and the citation, with the acknowledgments of service.

F. S. JACKSON,

H. O. CASTER,

*Attorneys for Appellants.*

**Acknowledgment of Service.**

We hereby acknowledge service of the foregoing praecipe and notice of its filing this 20th day of July, 1917.

FERRY, DORAN & COSGROVE,

*Attorneys for L. G. Treleven,  
Receiver of The Consumers  
Light, Heat and Power Com-  
pany."*

That immediately thereafter affiant prepared and filed with the clerk of the lower court a

praecipe pointing out additional portions of the record which the Receiver, L. G. Treleaven, deemed necessary for his defense on appeal, as follows:

"In the United States District Court, for the  
District of Kansas, First Division.

John M. Landon, as Receiver of  
the Kansas Natural Gas Com-  
pany, Plaintiff,

In Equity  
136-N.

vs.

The Public Utilities Commission  
of the State of Kansas *et al.*,  
Defendants.

**PRAECIPE.**

Comes now L. G. Treleaven, Receiver of The Consumers Light, Heat and Power Company, by Ferry, Doran & Cosgrove, his attorneys, and files with the clerk of the court this, his praecipe, pointing out additional portions of the record which he deems necessary for his defense on appeal, which should be incorporated in his behalf in the transcript made on appeal of the defendant above named.

First. This defendant and cross-petitioner desires incorporated in the transcript of the record the following exhibits omitted by the defendant, The Public Utilities Commission of the State of Kansas:

'Exhibits F, G and H' of this defendant's amended and supplemental answer.

Second. Exhibits to the evidence introduced by this defendant and cross-petitioner, filed, designated and marked as 'Exhibits L.G.T.-i.

L.G.T.-2, L.G.T.-3, L.G.T.-4, L.G.T.-5, and L.G.T.-6.'

FERRY, DORAN & COSGROVE,  
*Attorneys for L. G. Treleaven, Receiver of The Consumers Light, Heat and Power Company."*

That affiant is advised by the clerk of the lower court that said clerk duly prepared and transmitted all those portions of the record referred to therein, in the following language:

"That the amended and supplemental answer of L. G. Treleaven, Receiver of Consumers Light, Heat and Power Company, be included in said transcript, and that of the exhibits there be included Exhibits A, B, C, D and E, and that all other exhibits be not included."

That in addition thereto said clerk transmitted to the clerk of this Court all those portions of the record pointed out in the praecipe filed by this affiant on behalf of L. G. Treleaven, Receiver.

Affiant further states that neither L. G. Treleaven nor his attorney was present in the lower court when the stipulation shown on pages 1 and 2 of Volume 1 of the printed transcript of the record herein was made, and that neither L. G. Treleaven nor any of his attorneys signed said stipulation, or had any knowledge thereof until the printed record appeared; that when the record thus made up was transmitted by the clerk of the lower court to the clerk of this Court, neither the appellant nor anyone in its behalf served upon

either L. G. Treleaven or his attorneys any statement of the points on which appellant intends to rely, and which he thinks necessary for consideration, as required by paragraph 9 of Rule 10 of the rules of this Court. Affiant assumes, although he does not know, that this omission was in accordance with the provision contained in said stipulation, to the effect that:

"The filing of the statements of errors intended to be relied upon, and parts of the record necessary for the consideration thereof, with the proof of service provided for in Rule 10, are hereby waived."

And affiant further assumes that the clerk of this Court, in printing the record, followed said stipulation; and this affiant says that L. G. Treleaven, Receiver of the Consumers Light, Heat and Power Company, and affiant as one of his counsel, believes that the portions of the record hereinafter set out in this appendix are necessary for full consideration and correct determination of this cause, and respectfully asks that the same be considered in connection with the facts and arguments presented to the Court.

Further affiant saith not.

T. F. DORAN.

Subscribed and sworn to before me this 12th day of October, 1918.

(Seal)

LOUIE M. BAGLEY.

*Notary Public, Shawnee County, Kansas.*

My term expires Nov. 26, 1920.

The portions of the record deemed necessary to the proper defense of L. G. Treleaven, Receiver of the Consumers Light, Heat and Power Company, are as follows:

**First.**

Amended and supplemental answer (including exhibits attached, and therein referred to, and therewith filed) of L. G. Treleaven, Receiver of the Consumers Light, Heat and Power Company, in the court below. The original copy transmitted with the record is on file in the office of the clerk of this Court:

In the District Court of the United States

For the District of Kansas.

First Division.

John M. Landon, as Receiver of the Kansas

Natural Gas Company, Plaintiff,

vs.

In Equity. No. 136-N.

The Public Utilities Commission of the State  
of Kansas et al., Defendants.

**AMENDED AND SUPPLEMENTAL ANSWER OF L. G.  
TRELEAVEN, RECEIVER OF CONSUMERS LIGHT,  
HEAT AND POWER COMPANY.**

Now comes L. G. Treleaven, Receiver of the Consumers Light, Heat and Power Company, a corporation organized and existing under and by virtue of the laws of the state of Delaware, and for his amended and supplemental answer to the bill of complaint and supplemental bill of complaint herein, alleges:

**I.**

That he was duly appointed Receiver of the Consumers Light, Heat and Power Company, a

corporation organized and existing under and by virtue of the laws of the state of Delaware, in an action duly commenced and now pending in this court, wherein Central Trust Company of New York is complainant and Consumers Light, Heat and Power Company is defendant, on the 20th day of August, A. D. 1914, and that he is now, and has been since said 20th day of August, A. D. 1914, the duly appointed, qualified and acting receiver of said Consumers Light, Heat and Power Company.

## II.

That the allegations of fact contained in the original bill of complaint filed herein on December 29, 1915, and the allegations of fact contained in the supplemental bill of complaint filed herein on October 11, 1916, so far as said allegations concern the dealings and relation of this defendant Receiver to the transactions described in said original and supplemental bills of complaint, and so far as the same are material, are true, to the best knowledge and belief of this defendant Receiver, except as otherwise hereinafter set forth and alleged.

## III.

That the Consumers Light, Heat and Power Company is, and for many years last past has been, engaged in the distribution and sale of gas in the cities of Topeka and Oakland, Kansas. That its issued and outstanding capital stock is \$1,000,000, and there are outstanding bonds secured by mortgage or deed of trust which are liens upon the property of the company, aggregating \$1,000,000. That the Consumers Light,

Heat and Power Company has constructed, erected, laid, installed and otherwise acquired, and now owns and is possessed of lands, gas plants and works, and appurtenances and appliances, and also gas mains, pipes, feeders, service pipes, and appliances and appurtenances. *That the actual present value of its physical property devoted at this time to the use or convenience of the public is upwards of \$1,700,000.*

#### IV.

That the city of Topeka, Kansas, is a city of the first class, duly organized under the laws of the state of Kansas, and that the city of Oakland, Kansas, is a city of the third class, duly organized under the laws of the state of Kansas; that the city of Oakland, although a separate municipality, is in fact a suburb of the said city of Topeka, Kansas.

#### V.

That on the 7th day of August, A. D. 1903, the said city of Topeka, Kansas, duly passed, and thereafter on August 15, A. D. 1903, there was approved, Franchise Ordinance No. 2435, authorizing the Continental Oil and Gas Company to supply said city of Topeka and its inhabitants with natural gas for a period of twenty (20) years from the date of the acceptance of said ordinance, subject to the conditions therein contained; a true and correct copy of which ordinance as amended by Ordinance No. 2528 of September 8, A. D. 1904, is hereto attached as Exhibit "A" and made a part hereof. That said ordinance was duly accepted.

## VI.

That said city of Topeka, Kansas, on the 5th day of September, A. D. 1904, duly passed its Franchise Ordinance No. 2525, authorizing the Excelsior Coke and Gas Company to supply said city of Topeka, Kansas, with artificial or manufactured gas for a period of thirty (30) years; that a true and correct copy of said ordinance as amended by Ordinance No. 2532 of October 13, A. D. 1904, is hereto attached as Exhibit "B" and made a part hereof. That prior and subsequent to the passage of the last named ordinance of said city of Topeka, said Excelsior Coke and Gas Company was engaged in the manufacture and distribution of artificial gas to said city and its inhabitants.

## VII.

That about the year 1905 the Kansas Natural Gas Company, of which plaintiff herein is now receiver, constructed and installed a pipe line connecting its natural gas pipe lines with the cities of Topeka and Oakland, Kansas.

## VIII.

That on the 5th day of January, A. D. 1905, Joseph J. Heim of Kansas City, Missouri, and Arnold Kalman of St. Paul, Minnesota, the then owners of the Continental Oil and Gas Company's Franchise No. 2435 of the city of Topeka, above described, entered into a written contract with the Kansas Natural Gas Company for the sale and distribution of natural gas in said city of Topeka; a true and correct copy of which con-

tract is hereto attached as Exhibit "C" and made a part hereof.

#### IX.

That the Consumers Light, Heat and Power Company, by purchase, became the owner of all the rights, privileges and franchises of the Continental Oil and Gas Company under said Ordinance No. 2435 of said city of Topeka.

#### X.

That on the 1st day of May, A. D. 1905, the city of Topeka duly passed and thereafter, on May 3, 1905, there was approved a franchise ordinance, No. 2574, authorizing the Consumers Light, Heat and Power Company, its successors and assigns, to use the works, pipes and mains of the Excelsior Coke and Gas Company in the city of Topeka, for the purpose of selling and distributing natural gas, subject to the conditions therein contained, for a period of twenty (20) years; a true and correct copy of said Ordinance No. 2574 is hereto attached as Exhibit "D" and made a part hereof.

#### XI.

That the Consumers Light, Heat and Power Company thereafter became, and now is, the owner of all the property, rights and franchises of the Excelsior Coke and Gas Company.

#### XII.

That the city of Oakland, Kansas, on July 2, A. D. 1906, duly passed and approved Franchise Ordinance No. 32 of said city, authorizing the Consumers Light, Heat and Power Company,

subject to the conditions therein contained, to distribute and sell to said city of Oakland, and to its inhabitants, manufactured and natural gas, or either of them, for a period of twenty (20) years from the date of the acceptance of said ordinance; a true and correct copy of said Ordinance No. 32 of the city of Oakland is hereto attached as Exhibit "E" and made a part hereof. That said ordinance was duly accepted.

### XIII.

That pursuant to, and under the authority of, the aforesaid ordinance of the city of Topeka, and of said contract, Exhibit "C," the Consumers Light, Heat and Power Company, in the year 1905, began the distribution and sale of natural gas received by it from the Kansas Natural Gas Company's pipe lines, to said city of Topeka and its inhabitants; and that under said Franchise Ordinance No 32 of the city of Oakland, Exhibit "E" hereof, and said contract, Exhibit "C" hereof, the Consumers Light, Heat and Power Company, about the year 1907, began the distribution and sale of natural gas to said city of Oakland and its inhabitants; that since the aforesaid dates it has been furnishing and distributing natural gas to said cities and their inhabitants in such quantities as it has been able to procure from the Kansas Natural Gas Company. That said supply of natural gas was reasonably sufficient for a limited period and the service rendered reasonably satisfactory to the consumers, but that the returns therefrom have never yielded to the Consumers Light, Heat and Power Company, or to this Re-

ceiver, an adequate return on the investment of the Consumers Light, Heat and Power Company. This defendant further alleges that, due to the failure to receive a sufficient supply of natural gas, such business has become very unsatisfactory to consumers and unprofitable to the Consumers Light, Heat and Power Company, and said company has sustained heavy losses, and that, on account thereof, on application of the bondholders of said Consumers Light, Heat and Power Company, this defendant was, on the 20th day of August, A. D. 1914, duly appointed receiver of the Consumers Light, Heat and Power Company by this court.

#### XIV.

That the supply of natural gas has continued to decrease from year to year, and as a result thereof the losses of said Consumers Light, Heat and Power Company, and of this Receiver as such, have constantly increased. That said Consumers Light, Heat and Power Company and its Receiver have honestly, faithfully and diligently performed all their obligations under said franchises and contract, and have used every means within their power to secure an adequate supply of natural gas from the Kansas Natural Gas Company. That this Receiver, in the case of *John M. Landon and R. S. Litchfield, as Receivers of the Kansas Natural Gas Company, v. City of Lawrence et al.*, pending before the Public Utilities Commission for the State of Kansas, duly filed his application for an order directing and requiring said receivers of the Kansas Natural Gas Company to furnish a reasonably sufficient supply of natural gas to

meet the demands of the consumers in said cities of Topeka and Oakland, Kansas; but that no action has ever been taken upon said application by the Public Utilities Commission for the State of Kansas and no relief obtained therefrom. That this Receiver has made repeated demands upon the Kansas Natural Gas Company and its receivers for a sufficient supply of natural gas, but that said company and said receivers have failed, neglected and refused to deliver to this defendant Receiver a sufficient supply of natural gas, and have in writing declared their inability to do so, as appears from letter dated March 6, 1916, written by J. M. Landon, the plaintiff herein, to this defendant; a true and correct copy of which letter is attached as Exhibit "F," and made a part hereof.

#### XV.

This defendant further alleges that by reason of the failure of the Kansas Natural Gas Company and its receivers to furnish a reasonably sufficient supply of natural gas, this defendant has been compelled, and said receivers of the Kansas Natural Gas Company have directed him from time to time, to notify the inhabitants of the cities of Topeka and Oakland, Kansas, that the supply of gas was insufficient to meet their demands, and that they should provide themselves with other fuel, and that as a result thereof large numbers of customers and prospective customers of the Consumers Light, Heat and Power Company have abandoned the use of natural gas, wholly or in part. That the income of this defendant, as a consequence thereof, has been greatly diminished

and the business of supplying natural gas has been practically destroyed, and the profits of the Consumers Light, Heat and Power Company have been eliminated and heavy losses have been incurred.

#### XVI.

That from the date of beginning the distribution and sale of natural gas in said cities of Topeka and Oakland, as hereinbefore alleged, the Consumers Light, Heat and Power Company continued to sell natural gas in said cities at a joint rate of 25 cents net per thousand cubic feet, as fixed for the original period in the contract, hereinbefore referred to, attached hereto as Exhibit "C," down to and until the taking effect on the 10th day of January, A. D. 1916, of the joint rate of 28 cents net per thousand cubic feet fixed by the Public Utilities Commission for the State of Kansas, in its order dated the 10th day of December, A. D. 1915; a copy of which order is hereto attached as a part hereof, marked Exhibit "G." That the losses of the Consumers Light, Heat and Power Company, operating under the joint rate of 25 cents net per thousand cubic feet, distributed between the Kansas Natural Gas Company and the Consumers Light, Heat and Power Company, two-thirds to the former and one-third to the latter after deducting operating expense, depreciation, taxes and bond interest, were as follows:

1913.....	\$41,399.66
1914.....	49,693.76
1915.....	65,960.74

That the bond interest of \$50,000 annually, included in the figures for each of the above years, was not paid for the years 1914 and 1915.

#### XVII.

This defendant further shows and represents to the court that although the Consumers Light, Heat and Power Company and this defendant Receiver as such were defendants duly summoned in and were present during the hearing of the Public Utilities Commission for the State of Kansas, pursuant to which said joint rate of 28 cents was established by the said commission, as set forth in Exhibit "G" hereof, neither said Consumers Light, Heat and Power Company nor this defendant Receiver as such was permitted to introduce any evidence or make any showing of the value of the property of said company devoted to public use or of the rate necessary to furnish an adequate return upon such value; that said Public Utilities Commission for the State of Kansas never, during said hearing, or at any other time, upon its own initiative or otherwise, made any inquiry into, or investigation of, the value of the property of the Consumers Light, Heat and Power Company devoted to the use and convenience of the public or of the rate necessary to furnish an adequate return upon such value, and that said joint rate of 28 cents was arbitrarily fixed and established by said Public Utilities Commission for the State of Kansas against this defendant without any evidence whatever and without any consideration of its rights in the premises. This defendant Receiver represents and shows to the

court that said 28-cent rate, in so far as the same applied to the Consumers Light, Heat and Power Company and to this defendant as its receiver, is illegal and void, and amounts to a taking of the property of the Consumers Light, Heat and Power Company in the hands of this Receiver without due process of law, in violation of the Constitutions of the United States and of the State of Kansas, and is, therefore, void and unenforceable against this defendant.

#### XVIII.

This defendant further shows that the Public Utilities Commission for the state of Kansas fixed said joint rate upon the theory or assumption that two-thirds ( $2/3$ ) of said rate should be paid to the Kansas Natural Gas Company, or its receiver, and one-third ( $1/3$ ) thereof to this defendant. This defendant further shows that said Public Utilities Commission made no investigation whatever to determine whether the division of the rate between the Kansas Natural Gas Company, or its receiver, and this defendant, as above described, was equitable, just or fair as against this defendant and this defendant charges that said division of the rate is not equitable, just or fair as against this defendant, but on the contrary is illegal, unjust and discriminatory; that this defendant is entitled to a much larger proportion or percentage of said rate than one-third ( $1/3$ ) thereof.

#### XIX.

This defendant further shows that although said 28 cent rate is a joint rate, it is also a single, indivisible rate for the service rendered to the Cities

of Topeka and Oakland and their inhabitants; that it is legally impossible to determine a fair and equitable rate for such service without an investigation and determination of the total fair value of the property of this defendant, plus the value of the proportion of the property of the Kansas Natural Gas Company devoted to the public use of furnishing such service to the Cities of Topeka and Oakland and their inhabitants. This defendant shows that the two companies are entitled to have a rate fixed which will yield an adequate return upon such total fair value of the entire property devoted to the furnishing of such service; that the proper proportion or division of such rate as between the two companies rendering such service can only be arrived at by taking the proportion which the value of the property of each of said companies so devoted to the rendering of such service bears to the value of the entire property devoted to the public use of furnishing such service to the Cities of Topeka and Oakland and their inhabitants, as aforesaid.

## XX.

This defendant further shows that the said joint rate of 28 cents net per thousand cubic feet fixed by the Public Utilities Commission for the State of Kansas, as aforesaid, continued in effect from the 10th day of January, A. D. 1916, until the temporary injunction issued by this court, Judges Sanborn, Booth and Campbell sitting, restraining the enforcement of said rate, became effective on August 14, A. D. 1916, and thereafter until the present rates established by John M. Landon,

Receiver of the Kansas Natural Gas Company were installed and collected by this defendant on and after the September, A. D. 1916, meter readings. This defendant alleges that the present value of the property of the defendant upon which an adequate return must be allowed is upwards of \$1,700,000, and that the said so-called 28 cent joint rate established by the Public Utilities Commission for the State of Kansas utterly failed to yield to the Consumers Light, Heat and Power Company and to this receiver as such a reasonable or adequate return on the investment of the Consumers Light and Power Company in said cities of Topeka and Oakland, Kansas. That the Consumers Light, Heat and Power Company and this receiver as such have sustained heavy losses, operating under said 28 cent rate. That said rate is unreasonable, unjust, non-compensatory and confiscatory of the property and estate of the Consumers Light, Heat and Power Company in the hands of this receiver under the order of this court, and this receiver represents and shows to the court that a continuance of the use and distribution of natural gas in the cities of Topeka and Oakland, Kansas, under said 28 cent rate established by the Public Utilities Commission for the state of Kansas, and under the division of said rate between the Kansas Natural Gas Company on the basis of two-thirds ( $\frac{2}{3}$ ) thereof to said company, as aforesaid, is, and will continue to be, improvident, wasteful and destructive of the estate in the hands of this receiver and in the custody of this court, and is a legal and equitable fraud upon the creditors of the Consumers Light,

Heat and Power Company, and this defendant charges that upon the present supply of natural gas delivered by the Kansas Natural Gas Company to the Consumers Light, Heat and Power Company in the hands of this receiver, or upon any supply that may be furnished through the capacity of the present pipe lines, the 28 cent rate complained of by the plaintiffs herein cannot and will not at any time, under the division thereof above referred to, yield to the Consumers Light, Heat and Power Company a reasonable or adequate return on its investment, as aforesaid, or upon any valuation whatsoever, but is, and will continue to be, non-compensatory, unremunerative and confiscatory.

## XXI.

This defendant further alleges that the collection, transportation, distribution and sale of natural gas by the Kansas Natural Gas Company and its receiver and by the Consumers Light, Heat and Power Company and its receiver, jointly, in the manner in which said business is now and has been conducted, is interstate commerce and is free from the control or regulation of the Public Utilities Commission for the state of Kansas, or any other state authority; that the attempts of said Public Utilities Commission to regulate and control said business, and to regulate and control the prices at which natural gas collected, transported and delivered into the cities of Topeka and Oakland, Kansas, shall be sold in said cities are unwarranted and a direct interference with, and an undue burden upon interstate commerce and are in violation of Article I, Section 8 of the Constitu-

tion of the United States. This defendant alleges that by reason thereof the so-called 28 cent rate attempted to be fixed by the Public Utilities Commission for the State of Kansas, is unlawful and void. This defendant alleges and shows to the court that this court in this case (Judges Sanborn, Booth and Campbell sitting), held, in an opinion reported in 234 Fed. 164:

"(1) That the gas purchased or procured in Oklahoma, transported from Oklahoma, and sold or delivered by the receiver or by the gas company to parties in Kansas or Missouri, is an article of interstate commerce, as is the gas procured in Kansas and sold or delivered by them, or either of them, to parties in Missouri; (2) that this gas, which is probably at least 95 per cent of all the gas the receiver or the company handles, does not lose its interstate character by the fact that a small portion, probably not exceeding 4 per cent, of the gas they handle is procured and delivered in Kansas, is an article of intrastate commerce, and is inseparably mingled in the pipes with the interstate gas; (3) that the purchase or procuring of interstate gas in Oklahoma, its transportation, sale, and delivery by the receiver or the gas company, to parties in Kansas and Missouri, is interstate commerce, and the receiver and the company are engaged in interstate commerce; (4) that the enforcement by a state through its officers of any legislative act preventing interstate commerce in this article of interstate commerce, either by a direct prohibition of such commerce in this article by state law, or by an inhibition of a sale of the article in the state at any price whatever, or at any price

above a price so low that the laws of trade make it impossible to purchase or procure it in another state and to sell and deliver it in the prohibiting state at that price with profit, substantially burdens and unduly interferes with interstate commerce in violation of the commerce clause of the Constitution of the United States."

## XXII.

This defendant receiver specifically refers to the allegations of the bill of complaint herein, and hereby adopts the allegations thereof, and of the supplemental bill of complaint filed herein, in so far as the same support this answer, and this defendant alleges that the contracts and franchises referred to in said bill of complaint and particularly the contract between the Kansas Natural Gas Company and the Consumers Light, Heat and Power Company, a copy of which contract is attached hereto as "Exhibit C," in so far as the same affect the rates which may be charged for natural gas, in said cities of Topeka and Oakland, Kansas, by this defendant, are illegal and void for all the reasons set forth in said original and supplemental bills of complaint herein, and should be set aside and held to have no binding force or effect upon this defendant or the Consumers Light, Heat and Power Company; and this defendant further alleges that said contracts, and particularly the contract attached hereto as "Exhibit C," have been held to be void and of no binding effect in an opinion and order of Judge Thomas J. Flannelly of the District Court of Montgomery County, Kansas, a copy of which

opinion and order is attached hereto as a part hereof, marked "Exhibit H."

### XXIII.

This defendant receiver further shows and represents to the court that he has been informed by arguments heard in this court, by newspaper reports and by reports of conferences held with the Public Utilities Commission for the State of Kansas that negotiations are now pending by which the stock, property and assets of the Kansas Natural Gas Company are to be sold to the Doherty interests, known as the Empire Gas and Fuel Company or the Wichita Natural Gas Company, and that negotiations, both secret and public, are being had with the Public Utilities Commission for the state of Kansas with a view to fixing rates to be collected for natural gas sold in Topeka and Oakland and elsewhere; that negotiations are being had and plans formed and executed to dismiss this case from this court without final judgment herein; that all of said plans and negotiations for fixing rates and plans for the dismissal of this case are being carried forward without any consideration whatever being given to the rights of this defendant, or the Consumers Light, Heat and Power Company herein. This defendant alleges that the issues presented by this answer constitute a counter-claim arising out of the transaction which is the subject-matter of the suit, and alleges that the issues presented by the original and supplemental bills of complaint herein cannot be decided without a determination of the rights of this defendant, and of the issues presented by this

answer. This defendant shows that under the Federal Equity Rules he was obligated to state any counter-claim arising out of the transaction which is the subject-matter of the suit, and this defendant charges that the obligation so imposed upon him carries with it the corresponding right on the part of this defendant to insist upon a determination of any issue arising out of the transaction which is the subject-matter of the suit and which this defendant was obligated to state in his answer. This defendant charges that, although the complainant herein may not be compelled to continue the prosecution, as complainant, of the controversy set forth in the original and supplemental bills of complaint herein, said complainant cannot ask or require a dismissal of the entire litigation, and this defendant receiver charges that he is entitled to, and will, insist upon a determination of the issues raised by this answer without reference to the continued *prosecution by the Receiver of the Kansas Natural Gas Company, as complainant, of the controversy set forth in the original and supplemental bills of complaint herein*; and this defendant will insist that the Receiver of Kansas Natural Gas Company reply to the issues raised by this answer or in default thereof, that a decree be entered against said receiver; and this defendant will insist that the other parties against whom this defendant prays relief in this answer and who were made parties to this litigation by the complainant in his original and supplemental bills of complaint, be likewise compelled to reply and defend hereto. *This defendant alleges that he is entitled to have the contract be-*

between the Kansas Natural Gas Company and the Consumers Light, Heat and Power Company ("Exhibit C" hercof) declared null and void; that he is entitled to have judgment herein, that the business in which the Consumers Light, Heat and Power Company is engaged, through this defendant as its receiver, is interstate commerce, free from interference, regulation or control by the Public Utilities Commission for the state of Kansas, its attorneys and agents, or any other state authority, and this defendant is entitled to an injunction herein, on account thereof, against the Public Utilities Commission for the state of Kansas, its attorneys and agents, parties hereto, and against the attorney general of the state of Kansas, and his assistants, parties hereto, prohibiting and enjoining each and all of them from enforcing, or attempting to enforce, against this defendant *any rate* whatever, and this defendant is entitled to an injunction herein against the said Public Utilities Commission for the state of Kansas, its attorneys and agents, and against the attorney general of the state of Kansas, and his assistants, restraining and enjoining them, and each of them, from enforcing or attempting to enforce against this defendant the 28 cent rate or any of the penalties of the laws of the state of Kansas for his refusal to obey the orders of the Public Utilities Commission for the state of Kansas, or for failure to comply with, or to enforce and collect *any rates that may be established, or attempted to be established by said state authorities*, and prohibiting and enjoining each and all of said parties from interfering with this de-

fendant in the enforcement and collection of a just and remunerative rate for natural gas sold and delivered in said cities of Topeka and Oakland, Kansas; and this defendant further alleges and shows to the court that he is entitled to a decree that one-third ( $1/3$ ) of the 28 cent rate established by the Public Utilities Commission for the State of Kansas, as aforesaid, is an unjust, unfair and discriminatory division of such rate between the plaintiff Receiver of the Kansas Natural Gas Company and this defendant, and that the return to this defendant from the said 28 cent rate, divided between the Kansas Natural Gas Company and this defendant on the basis aforesaid, is non-compensatory, unreasonable and confiscatory of the property and estate of the Consumers Light, Heat and Power Company in the hands of this receiver as such; and this defendant further alleges that he is entitled to a decree that, notwithstanding the extensions which have been made and are being made into the gas fields by the Receiver of the Kansas Natural Gas Company, under an order of this court, the supply of natural gas has been, is now, and will, in the future, be inadequate and insufficient to enable this defendant, as Receiver of the Consumers Light, Heat and Power Company to earn or collect a just and adequate return on the investment of said Consumers Light, Heat and Power Company in said cities of Topeka and Oakland, Kansas, under said 28 cent rate, divided on the basis of two-thirds ( $2/3$ ) to the Kansas Natural Gas Company, and one-third ( $1/3$ ) to this defendant.

## XXIV.

This defendant Receiver further answering shows and represents to the court that S. M. Brewster, Attorney-General of the state of Kansas, and the Public Utilities Commission for the state of Kansas, and the individual members thereof are conspiring and confederating together for the purpose of securing the dismissal of this case, and have filed a motion in the District Court of Montgomery County, Kansas, asking that court to dismiss the case there pending, and praying for an order commanding and directing John M. Landon, receiver of the Kansas Natural Gas Company, plaintiff herein, to dismiss this cause in this court; and this defendant is informed and alleges the fact to be that said motion will be presented to the District Court of Montgomery County, Kansas, on the first day of February, A. D. 1917; and this defendant alleges that the purpose and intent of said Attorney-General of the state of Kansas and of the Public Utilities Commission for the state of Kansas is to secure the dismissal of this case for the purpose of preventing this defendant and other defendants similarly situated from securing the relief herein prayed and to which they are justly entitled; and this defendant further shows and represents to the court that the accomplishment of such purpose would be a legal and equitable fraud upon this defendant and a denial of justice without hearing; that this defendant has been put to large expense and trouble in and about preparing and presenting evidence in this case; and this defendant further shows that the dismissal

of this cause at this time in the manner and for the purposes planned by the parties aforesaid would compel the bringing of another action by this defendant, and would cause this defendant grave expense, trouble and annoyance in the collection, production and presentation of the evidence which has already been introduced in this case and which is necessary to a full determination of the rights of this defendant herein; that the expense thereof would be practically prohibitive of justice, result in a multiplicity of suits, and would amount to an equitable fraud, and would be prejudicial to this defendant in the independent action which he would be compelled to bring; and this defendant therefore alleges that he is entitled as a matter of equity and right to the benefits of the evidence already presented herein and to present his evidence and have final judgment entered herein in his behalf.

Wherefore, this defendant receiver prays:

1. That the contract heretofore existing between the Kansas Natural Gas Company and the Consumers Light, Heat and Power Company (Exhibit "C" hereof), be by this court set aside, and declared to be unlawful, null and void and of no binding force and effect as against the Consumers Light, Heat and Power Company and this defendant receiver; and that the Kansas Natural Gas Company, its receivers, John M. Landon and George F. Sharritt, its and their officers, agents, servants and employees, and each and all of them, be restrained and enjoined from attempting to en-

force said contract or any claim or right thereunder.

2. That the division of the 28-cent rate on the basis of two-thirds ( $2/3$ ) thereof to the Kansas Natural Gas Company and one-third ( $1/3$ ) thereof to the Consumers Light, Heat and Power Company be decreed to be unjust, unfair and discriminatory against the Consumers Light, Heat and Power Company and this receiver, and that the Kansas Natural Gas Company, its receivers, John M. Landon and George F. Sharritt, its and their officers, agents, servants and employees, and each and all of them, be restrained and enjoined from collecting, or attempting to collect, two-thirds ( $2/3$ ) of said 28-cent rate.

3. That the business of the Consumers Light, Heat and Power Company and of this receiver as such, be declared by this court to be interstate commerce, free from regulation and control as to rates, or otherwise, by the Public Utilities Commission for the state of Kansas, or any other state authority; that the Public Utilities Commission for the state of Kansas, and Joseph L. Bristow, C. F. Foley and John M. Kinkel, as the Public Utilities Commission for the state of Kansas, be restrained and enjoined from regulating or attempting to regulate the business of the Consumers Light, Heat and Power Company, and from fixing or attempting to fix rates which the Consumers Light, Heat and Power Company, or this receiver as such, shall or may charge for natural gas sold in the cities of Topeka and Oakland, Kansas, and that the 28-cent rate fixed by said

Public Utilities Commission for the state of Kansas be declared to be non-compensatory, unreasonable, confiscatory, null and void as to the Consumers Light, Heat and Power Company and as to this defendant receiver, and that said Public Utilities Commission for the state of Kansas, and Joseph L. Bristow, C. F. Foley and John M. Kinkel, as the Public Utilities Commission for the state of Kansas, H. O. Castor, as attorney for said Public Utilities Commission for the state of Kansas, and S. M. Brewster, as Attorney General of the state of Kansas, his and their assistants and each and all of them, be restrained and enjoined from enforcing and collecting and from attempting to enforce or collect any of the penalties fixed by the statutes of the state of Kansas for refusal of said Consumers Light, Heat and Power Company and this defendant as its receiver, to comply with the order of said Commission in fixing said 28-cent rate, or for refusing to comply with any other orders made by said Commission to compel the enforcement of said rate. And that pending the final determination of the issues herein set forth, the temporary injunction heretofore issued herein against said parties restraining and enjoining them from enforcing or attempting to enforce said 28-cent rate, pending final hearing, be continued in full force and effect.

4. That the cities of Topeka and Oakland, Kansas, and each of them, and their attorneys and representatives, be restrained and enjoined from enforcing or attempting to enforce collection of said 28-cent rate as against the Consumers Light,

Heat and Power Company and of this defendant receiver, and from enforcing, or attempting to enforce, any of the penalties fixed by the ordinances of said cities or the statutes of the state of Kansas, for refusal of the Consumers Light, Heat and Power Company, or this defendant receiver, to comply with said laws or ordinances or any orders made by any state or municipal authorities thereunder.

5. This defendant receiver further prays that the plaintiff herein, John M. Landon, receiver, and the defendants herein, the Public Utilities Commission for the State of Kansas, Joseph L. Bristow, C. F. Foley and John M. Kinkel as the Public Utilities Commission for the State of Kansas, S. M. Brewster, as Attorney General of the State of Kansas, H. O. Castor, as attorney for the Public Utilities Commission for the State of Kansas, George F. Sharritt, as receiver of the Kansas Natural Gas Company, the Kansas Natural Gas Company, the City of Topeka, Kansas, and the City of Oakland, Kansas, and each and every of them, be required to plead to this answer within ten days from the date of filing hereof, setting up any defense thereto they may have or claim to have, and that this court make such orders under the equity rules of this court as shall be just and proper relative thereto.

6. That this defendant may have such other or further or different relief in the premises as the

nature of the case may require and as shall be equitable and just.

L. G. TRELEAVEN,  
*Receiver of Consumers Light, Heat  
and Power Company.*

By FERRY, DORAN & COSGROVE,

MEAGHER, WHITNEY, RICKS & SULLIVAN,  
*Solicitors for said Receiver.*

T. F. DORAN,

JESSE J. RICKS,  
*Of Counsel.*

*State of Kansas, County of Shawnee—ss.*

L. G. Treleaven, of lawful age, being first duly sworn, on his oath states that he is the receiver of Consumers Light, Heat and Power Company, and that he has read the above and foregoing amended and supplemental answer and is familiar with the contents thereof and that the allegations therein contained are true.

L. G. TRELEAVEN.

Subscribed and sworn to before me this 30th day of January, A. D. 1917.

LOUIE M. BAGLEY,

(Seal)

*Notary Public.*

Commission expires Nov. 26, 1920.

### **Exhibit "A."**

ARTICLE 2—CONTINENTAL OIL AND GAS COMPANY,

(Took effect August 18, 1903.)

ORDINANCE NO. 2435.

*An Ordinance granting to the Continental Oil and Gas Company of Topeka, Kansas, its successors*

and assigns, for a period of twenty years, the right to construct, maintain and operate works for natural gas, together with the right to use all streets, avenues and public grounds of the City of Topeka, Kansas, for the purpose of laying their mains and pipes, supplying and delivering to said City of Topeka and the inhabitants thereof, gas for manufacturing, heating and illuminating and for all other purposes for which natural gas is or may be used during said period; and to regulate the price thereof.

*Be it ordained by the Mayor and Councilmen of the City of Topeka:*

Sec. 521. RIGHTS GRANTED. Sec. 1. That the Continental Oil and Gas Company of Topeka, Kansas, is hereby granted the right and privilege to use all streets, avenues, alleys and public grounds of the City of Topeka, Kansas, except the Kansas avenue bridge across the Kansas river, including all additions that hereafter may be made thereto, for the purposes of laying their mains and pipes to furnish to the said City of Topeka and the inhabitants thereof, natural gas for the term of twenty years from the date of the acceptance of this ordinance, as hereinafter provided, and shall have the right and authority to open and use the streets, avenues, alleys and public grounds of the said City of Topeka for the introduction of, and repairing and taking up of mains, pipes and lines laid for said purposes; *Provided*, That no mains or distributing pipes shall be laid in parking grounds.

Sec. 522. LOCATION OF MAINS. Sec. 2. That all mains and leading pipes from which gas is distributed throughout the said City of Topeka shall be placed not less than fifteen inches beneath the surface of the earth, when said mains and pipes are upon the traveled streets; and not less than six feet from the curb line, subject to the direction of the city engineer.

Sec. 523. LAYING MAINS; EXCAVATIONS. Sec.

3. That in the laying of said mains and pipes, and the exercise of the rights hereby granted, no street, alleys, or public grounds shall be at any time unnecessarily obstructed, and no water pipes, gas pipes or sewer now laid or which may hereafter be laid by said city or by any authorized person or corporation shall be interfered with or obstructed in any unnecessary manner, and all excavations or openings made therein by said the Continental Oil and Gas Company shall, within a reasonable time, be repaired and placed in as good condition as before such excavations or openings were made, or as it is possible to do, under the direction of the city engineer of said city, and shall thereafter be kept in such condition satisfactory to said city engineer: *Provided*, That if any excavation, opening or ditch in any of the streets, alleys or public grounds shall be left open or unrepaired, or any unnecessary opening or obstruction be left thereon by the said the Continental Oil and Gas Company, in violation of this section, the said city may cause such excavations, openings or ditches to be repaired and the obstruction to be removed, and the expense thereof shall be charged to and collected from the said the Continental Oil and Gas Company: *And further provided*, That in the laying of said mains and pipes the said the Continental Oil and Gas Company shall not make excavations in more than three blocks at any one time.

Sec. 524. MAINS; REMOVAL; CHANGE. Sec. 4. Said the Continental Oil and Gas Company, or their successors or assigns shall upon notice from the city engineer, remove or change at its expense, any gas mains, pipes or service pipes laid by them which may be in the way of, or interfere with the construction or erection of any public building or other public structure within said city.

Sec. 525. WORK BEGUN; COMPLETED. Sec. 5. That the said the Continental Oil and Gas Com-

pany, its successors and assigns, shall on or before the first day of March, A. D. 1905, commence the actual constructive work of carrying out the provisions of this franchise, and shall within three years from the acceptance of this ordinance complete the laying of the mains and pipes and be able to furnish gas in the principal parts of said city. (Sec. 5, as amended by Sec. 1, Ordinance No. 2528; September 8, 1904.)

Sec. 526. GAS RATES. Sec. 6. The said company shall not charge for the use of gas it may furnish to said city, or any of the inhabitants thereof, during said twenty years, a price greater than 45 cents per thousand feet for domestic purposes, and 30 cents per thousand feet for manufacturing purposes.

Sec. 527. SERVICE PIPES; WHO TO PAY FOR. Sec. 7. That for the purpose of supplying said city and citizens with natural gas, said the Continental Oil and Gas Company shall, at its own expense, furnish and lay all pipes necessary to convey the gas to the curb line of any property to be supplied, and all expense from the curb line shall be maintained and paid for by the owner or tenant.

Sec. 528. SERVICE TO CITY; TERMS. Sec. 8. For and in consideration of the rights, privileges and franchises hereby granted by the said City of Topeka, the said the Continental Oil and Gas Company, while continuing in the enjoyment thereof, shall furnish free of expense to the said City of Topeka, gas in sufficient quantities for light and heat for one building containing a council chamber and office rooms for the transaction of the city business, and one auditorium. The said the Continental Oil and Gas Company shall also provide and furnish to said City of Topeka gas for any number of incandescent lights, according to the American Meter Company's standard for all night lighting, which may be required by said city, and at such rates as may be agreed upon, not exceeding

fifty cents per light per month, payable monthly; the city to furnish burners, lamp posts, and to provide, at its own expense for lighting, extinguishing, cleaning and keeping said street lights in good order and repair, said lights not to burn to exceed twelve hours during any twenty-four hours.

Sec. 529. DAMAGES, ETC.: CITY PROTECTED. Sec. 9. The said the Continental Oil and Gas Company shall be liable to said City of Topeka for any and all damages and costs which said city may sustain or be compelled to pay by reason of the rights and privileges hereby granted, or on account of any excavation, opening or ditch in the streets, alleys or public grounds left open or un-repaired, or any obstruction thereof by said company, or that may, in any manner, result from the negligence of said company in the construction or operation of their gas lines, or exercise in any manner of said rights.

Sec. 530. COMPANY PROTECTED BY ORDINANCE. Sec. 10. Said city council shall, from time to time, pass such ordinances as may be necessary for the protection of the rights and property of said company, and for the enforcement of all reasonable rules and regulations which may be made by said company.

Sec. 531. ORDINANCE A CONTRACT. Sec. 11. This ordinance and the written acceptance thereof by the said the Continental Oil and Gas Company shall constitute a contract between the City of Topeka and the Continental Oil and Gas Company, and shall extend to, and be mutually binding upon, the said City of Topeka and the Continental Oil and Gas Company, its successors and assigns.

Sec. 532. FORFEITURE. Sec. 12. Upon the failure or refusal of the said the Continental Oil and Gas Company to comply with any of the terms and provisions of this ordinance on its part, this

ordinance and all the franchises, rights and privileges conferred thereunder, shall, at the option of the City of Topeka be forfeited and the same shall become null and void saving to the said the Continental Oil and Gas Company, or its successors or assigns the benefit of any delay caused by riot, strikes, injunctions or other *bona fide* legal proceedings, such delays not to exceed three years.

Sec. 533. FILE MAPS OR PLATS. Sec. 13. The said the Continental Oil and Gas Company or its successors and assigns shall be, and are required to file a map or plat with the city engineer, showing the location and size of all gas mains and distributing pipes laid in the said City of Topeka, and said map or plat shall be corrected every six months, showing all additional mains and distributing pipes laid.

Sec. 534. METER INSPECTION; EXPENSE. Sec. 14. The City of Topeka may at any time inspect, or cause to be inspected, the meters in use by the said the Continental Oil and Gas Company, and the expense of such inspection shall be charged to the said the Continental Oil and Gas Company and be paid by them: *Provided*, That such charges shall not exceed the sum of one hundred dollars in any one month.

Sec. 535. HOW GOVERNED, AMOUNT OF GAS. Sec. 15. The said the Continental Oil and Gas Company, and their successors and assigns, shall be subject to all general ordinances, rules and regulations of the City of Topeka now in force or hereinafter adopted in regard to gas companies and street excavations, and shall furnish not less than ten million cubic feet of natural gas in every thirty days.

Sec. 536. ACCEPTANCE; COST OF PUBLICATION. Sec. 16. That within ten days after the passage and approval of this ordinance, the said the Continental Oil and Gas Company shall file with the

city clerk of the City of Topeka an acceptance in writing of the provisions and conditions of this ordinance, which acceptance shall be duly acknowledged before some officer authorized to administer oaths; and at the same time, or prior thereto, the said company shall pay into the treasury of the City of Topeka, a sufficient sum of money to pay for the publication of this ordinance, and unless such acceptance is filed, this ordinance shall become null and void.

Sec. 537. GUARANTEE; MONEY DEPOSIT. Sec. 17. At or prior to the time of the acceptance of this ordinance said the Continental Oil and Gas Company shall deposit with the city treasurer of the City of Topeka, the sum of one thousand dollars as a guarantee that said the Continental Oil and Gas Company will carry out the terms and provisions of section 5 of this ordinance, and if said the Continental Oil and Gas Company shall fail on and before the first day of March, A. D. 1905, to commence the actual constructive work of carrying out the provisions of this franchise; or shall fail within three years from the acceptance of this ordinance to complete the laying of the mains and pipes and be able to furnish gas in the principal parts of said city, then the said sum of one thousand dollars shall be forfeited to and become the property of the City of Topeka, saving to said the Continental Oil and Gas Company the benefit of any delay caused by riot, strike, injunctions or other *bona fide* legal proceedings, such delays not to exceed three years. But if said the Continental Oil and Gas Company shall comply with the said terms of said section 5, as above set forth, then the said sum of one thousand dollars shall be returned to said the Continental Oil and Gas Company. A failure to deposit said sum of one thousand dollars as above provided, shall work a forfeiture of this franchise and the same

shall become null and void. (Sec. 17, as amended by Sec. 2, Ordinance No. 2528; September 8, 1904.)

TAKE EFFECT. Sec. 18. This ordinance shall take effect and be and remain in force from and after its publication in the official city paper.

Passed the Council August 7, 1903.

Approved August 15, 1903. W. S. Bergundthal, Mayor.

Attest: J. H. Squires, City Clerk.

### **Exhibit "B."**

ARTICLE 4—EXCELSIOR COKE AND GAS COMPANY.

(Took effect September 30, 1904.)

ORDINANCE NO. 2525.

*An Ordinance* granting the Excelsior Coke and Gas Company, of Topeka, Kansas, its successors and assigns, the use of the streets, avenues, alleys and public grounds for gas mains and laterals to be used in supplying the City of Topeka and its inhabitants with artificial or manufactured gas for light and heat and other purposes, and fixing the maximum rate for the sale of said gas.

*Be it ordained by the Mayor and Councilmen of the City of Topeka:*

Sec. 555. RIGHTS GRANTED. Sec. 1. That the Excelsior Coke and Gas Company of Topeka, its successors and assigns, is hereby granted the right and privilege of using the public streets, avenues and alleys, and public grounds of the City of Topeka, for the purpose of laying down pipes and mains for the conveyance of artificial or manufactured gas in and through the said city for use of said city and its inhabitants, for the period of thirty years from the passage and approval of this ordinance, and the rights heretofore acquired by said Excelsior Coke and Gas Company in the

streets, avenues and alleys and public grounds of the City of Topeka are hereby extended during said period of thirty years, subject to all the provisions, conditions and qualifications as provided in this ordinance.

Sec. 556. GOVERNED BY ORDINANCE. Sec. 2. That in making any and all improvements and excavations, and in exercising any and all rights and privileges granted by this ordinance, the same shall be done by said gas company in accordance with the ordinances of said city, and in strict compliance with each and all of the conditions, terms and directions, and subject to each and all of the penalties and liabilities imposed by the ordinances of the City of Topeka. All excavations and other work or improvements affecting the use of the streets, avenues, alleys and public places of the city shall be done under the general direction and supervision of the city engineer of said city.

Sec. 557. DAMAGES, ETC. CITY PROTECTED. Sec. 3. That said the Excelsior Coke and Gas Company shall save said city harmless from all costs, damages and expenses for the payment of which said city may become liable to any person, company or corporation by reason of the granting of the rights and privileges herein, or by reason of the construction or operation of said gas plant or by reason of said company's failing to conform to or comply with any of the provisions or requirements herein, or in any other of the lawful ordinances of said city.

Sec. 558. GAS RATES. Sec. 4. That the Excelsior Coke and Gas Company, its successors and assigns, shall never charge any of the inhabitants of said city, during the period of this grant, more than one dollar and twenty-five cents per thousand cubic feet of gas furnished by said company: *Provided, however,* That when the sales of gas in any one year shall reach 200,000,000

cubic feet, then commencing with the beginning of the following year the price charged shall never thereafter exceed one dollar and twenty cents per thousand cubic feet, and when the sales of gas in any one year shall reach 400,000,000 cubic feet, then commencing with the following year the price charged shall never thereafter exceed one dollar and ten cents per thousand cubic feet, and when the sale of gas in any one year shall reach 800,000,000 cubic feet, then commencing with the beginning of the following year the price charged shall never thereafter exceed one dollar per thousand cubic feet. Said company shall not at any time during the continuance of this franchise charge the City of Topeka for gas used a higher rate than the lowest current rate charged any of its customers. (Sec. 4 as amended by Sec. 1, Ordinance No. 2532; October 13, 1904.)

Sec. 559. FILE REPORTS, MAPS, ETC. Sec. 5. As a consideration for the granting of this franchise said the Excelsior Coke and Gas Company shall during the month of January, 1905, and during the months of January and July each year thereafter, file with the city clerk of said city a verified report covering the business of said company for the preceding six months, which said report shall show improvements made and cost thereof; amount of gas manufactured and amount sold; amount and cost of fuel used and amount of by-products produced, the disposition thereof and revenue received therefrom; the number of miles of mains and meters in use; also showing the total amount of capital invested in the plant and total receipts and expenditures. Within thirty days after the completion of the improvements and extensions, hereinafter provided to be made, the said company shall file in the office of the city engineer of said city a map or plat showing the location, size and kind of all gas mains laid in

said city, and said company shall each year thereafter furnish to said city engineer supplemental maps, showing the location, size and kinds of mains laid subsequent to the last report.

Sec. 560. NET EARNING: MAXIMUM RATES. Sec. 6. As a consideration for the granting of this franchise said the Excelsior Coke and Gas Company shall annually, from and after the acceptance of this ordinance, pay into the city treasury of the City of Topeka ten per cent. of its annual net earnings over and above ten per cent. earned by said the Excelsior Coke and Gas Company on its investment and in consideration thereof, all contracts, rights, privileges, licenses and franchises, hereby granted to said the Excelsior Coke and Gas Company shall continue in force for a period of thirty years from and after the date of the passage and approval of this ordinance. The Mayor and Council of the City of Topeka shall, at all times during the existence of the grant, contract and privileges in this ordinance contained, have the right by ordinance to fix a reasonable schedule of maximum rates to be charged by the said the Excelsior Coke and Gas Company within said city: *Provided, however,* That said Mayor and Council shall at no time fix a rate that will prohibit said company from earning at least ten per cent. (10%) on its capital invested in said City of Topeka, over and above its reasonable operating expenses and expense for maintenance and taxes.

Sec. 561. ACQUISITION OF PLANT; PROCEEDINGS. Sec. 7. That upon the termination of said franchise, at the conclusion of said period of thirty years, the said City of Topeka may acquire title to said Excelsior Coke and Gas Company's grant, rights and privileges, as well as all the property pertaining thereto, in the manner following, that is to say: The said City of Topeka may, upon

the termination of this grant, file a petition in the District Court of Shawnee County, Kansas, against said Excelsior Coke and Gas Company, or against any successors or assigns of said Excelsior Coke and Gas Company, which petition shall contain a general description of the plant or property, setting forth the interest or property rights of said corporation or others therein, as nearly as may be done, and praying that the city may be permitted to acquire title thereto in the manner provided by an act of the legislature of the State of Kansas, approved March 13, 1903, entitled, "An act relating to cities of the first class and repealing Chapter 37 of the Laws of 1881, and all acts amendatory and supplemental thereto, and Chapter 82, Laws of 1897, and all act amendatory and supplemental thereto in so far as the same relate to cities of the first class."

Thirty days notice shall be given to all persons interested in said property at the time for the hearing of said application, by publication in three successive issues of some weekly newspaper of the City of Topeka, having general circulation therein, the first publication to be made in said paper not less than thirty days prior to the time of said hearing; and notice shall be further given by delivering a copy of the notice, so as aforesaid to be published, to the manager in the charge of the said the Excelsior Coke and Gas Company's property if such manager can be found within the county of Shawnee; that in such proceedings, petition and notice, it shall not be necessary to state the names of any of the parties interested as defendants, except those of the reputed owner or owners.

That after said notices have been served and made as hereinbefore provided, the said property shall be appraised and acquired and paid for by the said city in strict accordance with the require-

ments and provisions of said act, approved March 13, 1903, relating to cities of the first class, hereinbefore referred to, and the procedure therein directed shall be in all respects complied with and followed.

Sec. 562. EXTENSIONS; FREE METERS, ETC.; COMMENCEMENT; COMPLETION. Sec. 8. And as a further consideration for the granting of this franchise, said the Excelsior Coke and Gas Company is to improve its gas plant and increase its capacity and enlarge and extend its gas mains and services so as to furnish gas to portions of said city not now supplied; and said company is to put in service pipes and meters free of charge to the consumers. Said company is to commence the work of improving its plant and extending its mains and services within three months of the taking effect of this ordinance, and the same is to be fully completed within eighteen months after commencing said work. (Sec. 8, as amended by Sec. 1, Ordinance No. 2532; October 13, 1904.)

Sec. 563. IMPROVEMENTS; GUARANTEE; MONEY DEPOSIT. Sec. 9. And as a further consideration for the granting of this franchise, said the Excelsior Coke and Gas Company agrees and binds itself to make improvements and extensions aforesaid costing the *bona fide* sum of at least one hundred and seventy-five thousand dollars (\$175,000.00); and as a guaranty that it will make said improvements and extensions and expend the said sum of one hundred and seventy-five thousand dollars (\$175,000.00) in doing so, said the Excelsior Coke and Gas Company shall, at or prior to the time of the acceptance of this ordinance, deposit with the city treasurer of said city the sum of ten thousand dollars (\$10,000.00), the conditions of which deposit shall be as follows: If the said company shall fail to commence the work of improvement and extension, as hereinbefore provided

within three months from the taking effect of this ordinance, or shall fail to expend the said sum of one hundred and seventy-five thousand dollars (\$175,000.00) in making said improvements and extensions in said city within eighteen months from the time of commencing said work, then the said sum of ten thousand dollars (\$10,000.00) shall thereby become forfeited to and become the money and property of the City of Topeka, and the same shall be turned into the general revenue fund of said city; but if said company shall commence the said work of improvement and extension within three months from the taking effect of this ordinance, and shall expend the said sum of one hundred and seventy-five thousand dollars (\$175,000.00) in said work of improvement and extension within eighteen months from the time of commencing said work, then the sum of ten thousand dollars (\$10,000.00) shall thereupon be returned to said company. A failure to deposit the said sum of ten thousand dollars (\$10,000.00) at or prior to the time of the acceptance of this ordinance shall work a forfeiture of this franchise and the same shall thereby become null and void. At the expiration of eighteen months after construction has commenced the mayor and council shall have the right to examine the books of said company in order to determine whether the amount of one hundred and seventy-five thousand dollars (\$175,000.00) has been expended according to the terms of this ordinance. (Sec. 9 as amended by Sec. 1, Ordinance No. 2532; October 13, 1904.)

Sec. 564. LIMITED TO ARTIFICIAL GAS. Sec. 10. It is understood that this is a franchise granted to said company to manufacture and furnish artificial or manufactured gas in said city and not to furnish natural gas, and that said city does not hereby relinquish any of its rights to contract for a supply of natural gas by said com-

pany under the laws of Kansas; and it is especially understood that the rates herein provided for apply to artificial or manufactured gas and not to natural gas, and that the said city does not relinquish its right to regulate and fix a fair and reasonable maximum rate for natural gas, which may at any time be furnished to said city or its inhabitants.

Sec. 565. FORFEITURE. Sec. 11. Upon the failure or refusal of said the Excelsior Coke and Gas Company to comply with any of the provisions of this ordinance or any other lawful ordinance of said city regulating and governing gas companies the rights and privileges herein granted shall be forfeited and this ordinance shall thereupon become null and void.

Sec. 566. MAKE RULES AND REGULATIONS. Sec. 12. Said the Excelsior Coke and Gas Company shall have the right to make all reasonable rules and regulations for the prevention of loss or waste in the conduct and management of its business and the sale and distribution of gas to its customers, as may from time to time be deemed necessary.

Sec. 567. COURT COSTS TO BE PAID. Sec. 13. As a condition for the passage of this ordinance, said the Excelsior Coke and Gas Company hereby agrees to pay the sum of two thousand five hundred dollars (\$2,500.00) toward the payment of court costs adjudged, or that may be adjudged, against the City of Topeka in the suit of the Excelsior Coke and Gas Company against the City of Topeka, No. 7938 in the circuit court of the United States for the district of Kansas; the said costs to include the sum of two hundred and twenty-five dollars (\$225.00) already deposited in costs in said court. And in case the said costs do not amount to the sum of two thousand five hundred dollars (\$2,500.00) the said company shall pay all of said costs, including said sum of

two hundred and twenty-five dollars (\$225.50) already paid by said city; said payment of costs to be made as soon as the same are determined and become payable. If said company should fail to make payment of costs as herein provided, this franchise shall be null and void.

Sec. 568. ACCEPTANCE; CONTRACT. Sec. 14. That within thirty days after the passage and approval of this ordinance, said the Excelsior Coke and Gas Company shall file with the city clerk of said city its acceptance in writing of the provisions, terms and conditions of this ordinance, which said acceptance shall be duly acknowledged before some officer authorized to administer oaths. This ordinance, unless so accepted, shall become null and void, but when so accepted, shall be and constitute a contract between the City of Topeka, and said Excelsior Coke and Gas Company, its successors and assigns, subject to the provisions and limitations hereinbefore set forth.

Sec. 569. REPEAL. Sec. 15. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

TAKE EFFECT. Sec. 16. This ordinance shall take effect and be in force from and after its acceptance by the Excelsior Coke and Gas Company, as aforesaid, and its publication in the official city paper.

Passed the Council August 1, 1904.

Approved.....

The mayor's vote on this ordinance was presented to the city council September 5, 1904, and on roll call the ordinance was passed over the mayor's veto by the following vote: Ayes, Councilmen Kutz, Ryder, Griley, Holliday, Rice, Howe, Shimer, Swendson and Hughes—9. Noes, Neil—1. Absent, Green and Nellis—2.

Attest: J. H. Squires, City Clerk.

(Acceptance of Ordinance filed Sept. 30, 1904.)

**Exhibit "C."**

THIS AGREEMENT MADE AND ENTERED INTO this Fifth day of January, A. D. 1905, by and between the KANSAS NATURAL GAS COMPANY, a corporation duly organized and existing under the laws of the State of Delaware, party of the first part, and JOSEPH J. HEIM, of Kansas City, Missouri, and ARNOLD KALMAN, of St. Paul, Minnesota, parties of the second part, WITNESSETH:

THAT, WHEREAS, the party of the first part is the owner of a large acreage of gas leases, with a number of gas wells drilled thereon, in the gas belt of Kansas, and desires to find a market for its product; and

WHEREAS, the parties of the second part, are the owners, by assignment, of an ordinance in Topeka, Kansas, known as "Ordinance No. 2435, entitled:

"An ordinance granting to the Continental Oil and Gas Company of Topeka, Kansas, its successors and assigns, for a period of Twenty (20) years, the right to use the streets, avenues and public grounds of Topeka, Kansas, for the purpose of laying their mains and pipes, supplying and delivering to the said City of Topeka and the inhabitants thereof, for manufacturing, illuminating and heating, and for all other purposes for which natural gas is used, during the said period, and to regulate the price thereof." Passed by the Council of the city of Topeka, August 7th, 1903. Approved by the Mayor, August 15th, 1903. Amended by Ordinance No. 2528; said amendment passed by the Council, September 5th, 1904, and approved by September 6th, 1904, by the Mayor of the City of Topeka, Kansas; and

WHEREAS, It is the intention and purpose of the parties of the second part to construct a complete system of pipe lines under said ordinance in the

said city of Topeka, and they desire to secure a supply of gas for the said city and its inhabitants.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH; That the party of the first part hereby agrees to lay and complete, or cause to be laid and completed within one year from and after January 1st, 1905 (unavoidable delays excepted), a pipe line for conveying natural gas from the gas fields of Kansas to a point at the city limits of the city of Topeka, Kansas, and to install and maintain at said point a reducing and regulating station for the delivery of gas into the mains and pipe line system of the parties of the second part in the said city of Topeka, Kansas.

That it will for and during the term of Eighteen (18) years from and after August 15, 1905, supply and deliver through the said pipe lines and through said reducing and regulating station, natural gas in sufficient volume to maintain a pressure, not to exceed Four (4) ounces, on the principal main lines of the low pressure system, in said city, that will, at all times fully supply the demand for all purposes of consumption, as provided in this contract, and at such prices per thousand cubic feet as are hereinafter agreed upon, or may hereafter be agreed upon, in accordance herewith. However, as the production of gas from the wells, and the conveying of it over long distance, is subject to accidents, interruptions and failures, the party of the first part does not, by this contract, undertake to furnish the parties of the second part with an uninterrupted supply of gas for the period named herein but only to furnish such a supply for such a period of time as the wells and pipe lines supplying gas to the parties of the second part are capable of supplying, and in case of its inability to fully supply all of the cities and towns with which it is connected, the gas supplied under this control shall, at all times, be a pro rata share

of the total deliveries of gas. And it is expressly understood and agreed by the parties of the second part and the party of the first part, that the party of the first part shall not be liable for any loss, damage or injury to the parties of the second part that may result directly or indirectly from such shortages or interruptions; but said party of the first part agrees to use diligence to supply the said parties of the second part with a constant and adequate supply of merchantable gas for all consumers, that the parties of the second part may secure within the corporate limits of the city of Topeka, Kansas, as the said limits now exist or may be hereafter established by law.

The party of the first part further agrees, that if it should secure the franchise in the city of Topeka, for which it has now made application, that it will assign the same to the said parties of the second part at actual cost.

The party of the first part also further covenants and agrees, that it will furnish gas free of expense to the said second parties, in sufficient quantities for light and heat for one building, containing a Council chamber and office rooms for the transaction of the City business and one auditorium, in accordance with the requirements of the aforesaid ordinance.

The said parties of the second part, for and in consideration of the covenants and agreements of the party of the first part, hereby covenant and agree to procure, construct, maintain and operate, during the continuance of this contract, a system of pipe lines in, through and along such streets, avenues, alleys and public grounds in said city, as may be necessary; to supply said city and all its inhabitants who may desire to purchase and use natural gas for any purpose with such gas, and the low pressure system of said pipe lines shall be of sufficient size to deliver an ample supply of gas to

the said city of Topeka and all of its inhabitants at all times, with a pressure not to exceed Four (4) ounces on the principal main lines of said low pressure system; to construct and maintain all necessary appliances and connection, and service lines; to keep said appliances, lines and pipe connections in good repair and serviceable condition, to prevent leakage, waste or escaping of gas, and to extend the mains for new consumers whenever they can secure an average of one responsible consumer for each one hundred feet of such line, to make proper connections with and attachments to the pipe line of said party of the first part at said reducing stations of the said party of the first part; to locate and furnish an office at some convenient point in said city, to be selected by the said second parties; to employ and pay all necessary clerks and employees required to conduct and carry on the business of furnishing and supplying natural gas to all consumers in said city; to make all contracts for supplying natural gas to consumers; to use its best endeavors to secure consumers, and to build up and extend said business by advertising, soliciting by agents and otherwise, and to do all things necessary to manage and conduct said business and furnish natural gas to all consumers in said city during the continuance of this contract.

Said parties of the second part covenant and agree with said party of the first part, to use first class material in the construction of their pipe line and other work, and to construct the same in a good and workmanlike manner; to assume all expense, cost, labor and risk incurred in the construction, operation and management of said pipe lines and business within the corporate limits of said city, from their connection with the pipe line of the party of the first part, and to pay all taxes and assessments of every kind whatsoever

on all of the property in said city, and that they will (unavoidable delay excepted), have said plant, so to be constructed, fully completed, and will receive gas from the said party of the first part, and begin its distribution to consumers upon the completion of said first party's line to the city limits, as herein agreed, not later than January 1st, 1906.

IT IS FURTHER COVENANTED AND AGREED, by and between the said party of the first part, and said parties of the second part, that the prices to be charged and collected for all natural gas furnished and sold to consumers within the said city under this contract, during the continuance of the same, shall be regulated and fixed by said party of the first part, but that the price to be fixed shall in no case, be less than Twenty-eight (28) cents per thousand cubic feet, for the first two (2) years after the gas is turned into the lines, and for the three (3) succeeding years, not less than Thirty-three (33) cents per thousand cubic feet, and thereafter not less than Thirty-eight (38) cents per thousand cubic feet, for all gas sold to be used for domestic purposes, and not to exceed Fifty (50) cents per light per month, for each incandescent light used for street lighting according to the American Meter Company's standard for all night lights; subject to a discount of three (3) cents per thousand feet when payment is made on or before the tenth of the month, for gas consumed during the preceding month.

That said parties of the second part shall pay to the said party of the first part, at the General Office of said party of the first part, wherever the same may be located, on or before the Fifteenth (15th) day of each and every month during the continuance of this contract, Sixty-six and two-thirds ( $66 \frac{2}{3}$ ) per cent. of its gross earnings from the sales of natural gas during the preceding

month, for street lighting and domestic purposes, less the amounts of uncollectible bills, when the delinquent party has been shut off for default of payment thereof, within thirty (30) days after maturity of such bill or bills, and all reasonable efforts have been made to collect such delinquent bills without success. If, at any subsequent time or times, any bill or bills which are deemed uncollectible shall be paid in whole or in part, said parties of the second part shall pay to the said party of the first part, Sixty-six and two-thirds ( $66\frac{2}{3}$ ) per cent. thereof, hereinbefore stipulated to be paid by them to the said party of the first part. Contracts for sales of gas for manufacturing and other purposes, may be made at such special rates as may be agreed upon by the parties hereto, and the price to be paid to the party of the first part for the gas used therefore, shall be such as may be mutually agreed upon by the parties hereto, at the time of making said contract.

IT IS FURTHER COVENANTED AND AGREED by and between the party of the first part and the parties of the second part that the said parties of the second part will do or procure to be done all plumbing necessary to make service connections between main and house for consumers, free of cost to the consumers; furnish all meters to be used by the consumers and set the same free of cost to the consumers; require all consumers to sign a contract for gas, before connections are made with their pipe line or gas turned into the house or service pipes of such consumers; that all gas sold shall be supplied through meters of approved design; that such meters shall be read and inspected once each month, and shall be kept in such working order and efficiency by said second parties that each meter shall register within Two (2) per cent. of the actual amount of gas passed

through it. That the parties of the second part will, at all times, permit the officers or authorized agents of the party of the first part to inspect their mains, pipes, regulators, meters and appliances, for the purpose of verifying their monthly statements, as herein provided, and for the purpose of determining the condition of said mains, pipes, regulators, meters and other appliances; and further, that they, the parties of the second part, will forward to the party of the first part, a weekly record of the number of contracts made and canceled, and the number of meters set, connected and disconnected, together with the total number of consumers at the end of each week, and will make and keep at its office a copy of such contracts, together with a full and complete record of the same, and of all meters used, and will also keep at the said office such books of accounts as will clearly and fully show all accounts and contracts with consumers, and all other transactions and matters relating to the business of the said parties of the second part, which said system of accounts, books, contracts and records, shall be subject to the approval of the party of the first part, and which, together with any and all other papers relating to or connected with the business matter of the said parties of the second part under this agreement and contract, shall be at all reasonable and proper times, day and night, open to examination and inspection by the officers, agents, attorneys and employes of said party of the first part, and that the said parties of the second part will, by their agents and employes, aid and assist said officers, agents, attorneys and employes of the said party of the first part in making such examination and inspection, whenever requested to do so by them.

While this agreement shall remain in force, the parties of the second part shall purchase of the party of the first part all the gas necessary to supply the city of Topeka, Kansas, and its inhabitants, and the business houses and manufacturing plants therein, except that, in the event of the party of the first part's failure to supply gas, as herein provided, said parties of the second part may secure gas from other sources until the first party shall supply gas, as herein provided; and the party of the first part shall not supply gas to any other firm, corporation or individual which may be a competitor of the second parties in selling and distributing gas in the said city of Topeka, Kansas.

IT IS FURTHER COVENANTED AND AGREED, by and between the said party of the first part and the said parties of the second part, that the said parties of the second part will, at the end of each and every calendar month, during the continuance of this contract, deliver to said party of the first part, at the general office of the said party of the first part, a statement showing in detail, the amount collected for gas sold and delivered to consumers during said month, and also, the amount of all bills for gas sold and delivered during the said month which have not been paid.

IT IS FURTHER COVENANTED AND AGREED, by and between the said party of the first part, and the said parties of the second part, that, if the parties of the second part shall, for a period of Thirty (30) days neglect or fail to pay said party of the first part any money due it under this contract, or shall neglect and fail to perform faithfully and fully each and every covenant and agreement herein stipulated to be performed by the said parties of the second part this contract shall at the option of the said party of the first part, be cancelled and an-

nulled and all rights of said parties of the second part hereunder forfeited, and said party of the first part, shall in such cases, have the right to enforce by action or actions, at law or in equity, the payment of any money due or to become due to it, the said party of the first part, and any claim for damages, or other claim or claims that the said part of the first part may have against the said parties of the second part by reason of the premises.

AND IT IS FURTHER AGREED AND COVENANTED, by and between said party of the first part and the said parties of the second part, that all of the covenants and agreements and stipulations hereinbefore set out to be kept and performed by said parties of the second part shall be binding upon and enforceable against their heirs and assigns by the party of the first part, its successors and assigns, and that all of the covenants, agreements and stipulations hereinbefore set out to be kept and performed by said party of the first part shall be binding and enforceable against its successors and assigns, by the said parties of the second part, their heirs and assigns; and that this agreement may be assigned by the parties of the second part, to a corporation organized to undertake the work covenanted and agreed to be performed by the said parties of the second part, but the said corporation accepting the assignment from said second parties shall not assign the same, without the consent, in writing, of the said party of the first part, its successors and assigns.

IN TESTIMONY WHEREOF, the said KANSAS NATURAL GAS COMPANY has hereunto caused its corporate name and seal to be affixed by R. M. Snyder, its Vice-President, and John S. Scully, Jr., its Secretary; and the said JOSEPH J. HEIM and ARNOLD KALMAN have hereunto attached their hand

and seals on the day and year heretobefore written and set out.

KANSAS NATURAL GAS COMPANY,

By R. M. Snyder,  
Vice-President.

Attest:

John S. Scully, Jr.,  
Secretary.

(Seal)

Joseph J. Heim (Seal)  
Arnold Kalman (Seal)

Witnesses:

Hugh C. Moul,  
E. Moye Elick.

### Exhibit "D."

ARTICLE 5—EXCELSIOR COKE AND GAS COMPANY  
AND CONSUMERS LIGHT, HEAT AND POWER  
COMPANY.

(Took effect May 4, 1905.)

ORDINANCE NO. 2574.

*An Ordinance* authorizing the Excelsior Coke and Gas Company of Topeka, a corporation, its successors and assigns, to permit the Consumers Light, Heat and Power Company, a corporation, its successors and assigns, to use the works, pipes and mains of said the Excelsior Coke and Gas Company of Topeka, within the City of Topeka, for the purpose of distributing and selling the natural gas by said Consumers Light, Heat and Power Company, its successors and assigns, within said City of Topeka.

*Be it ordained by the Mayor and Councilmen of the City of Topeka:*

Sec. 570. RECITALS; RIGHTS GRANTED; CONDITIONS. Sec. 1. Whereas The Consumers Light, Heat and Power Company, a corporation, has, by purchase and assignment, become the owner of an

ordinance of the City of Topeka, No. 2435 entitled "An ordinance granting to the Continental Oil and Gas Company of Topeka, Kansas, its successors and assigns, for a period of twenty years, the right to construct, maintain and operate works for natural gas, together with the right to use all streets, avenues and public grounds of the City of Topeka, Kansas, for the purpose of laying their mains and pipes, supplying and delivering to said City of Topeka, and the inhabitants thereof, gas for manufacturing, heating and illuminating, and for all other purposes for which natural gas is or may be used during said period, and to regulate the price thereof," as amended by ordinance of said City of Topeka No. 2528, entitled "An ordinance amending sections 5 and 17 of an ordinance entitled, 'An ordinance granting to the Continental Oil and Gas Company of Topeka, Kansas, its successors and assigns, for a period of twenty years, the right to construct, maintain and operate works for natural gas, together with the right to use all streets, avenues and public grounds of the City of Topeka, Kansas, for the purpose of laying their mains and pipes, supplying and delivering to said City of Topeka, and the inhabitants thereof, gas for manufacturing, heating and illuminating, and for all other purposes for which natural gas is or may be used during said period, and to regulate the price thereof,'" and of all the rights and privileges thereunder, or granted thereby; and

Whereas, said Consumers Light, Heat and Power Company has begun the work of construction of its system of pipes and mains, in accordance with said ordinance; and

Whereas, said the Excelsior Coke and Gas Company of Topeka, is the owner of a system of works, mains and pipes within said City of Topeka, used for the purpose of distributing and

selling within said city, artificial or manufactured gas; and,

Whereas, said the Excelsior Coke and Gas Company of Topeka, and said Consumers Light, Heat & Power Company are willing, with the consent of said City of Topeka, to arrange between themselves for the use of the system of works, mains and pipes of said the Excelsior Coke & Gas Company of Topeka by said Consumers Light, Heat & Power Company, its successors and assigns, for the distribution and sale of natural gas within said City of Topeka, during the continuance and maintenance of a sufficient supply of such natural gas:

The City of Topeka does hereby consent that said the Excelsior Coke and Gas Company of Topeka, its successors and assigns, may, by lease or other contract, permit said Consumers Light, Heat & Power Company, its successors and assigns, to use, maintain and operate the system of works, mains and pipes of said the Excelsior Coke and Gas Company of Topeka, within the City of Topeka, for the purpose of distributing and selling natural gas, within said city, under the ordinances now owned as aforesaid by said Consumers Light, Heat and Power Company, and that the acquisition of works, mains and pipes of said the Excelsior Coke and Gas Company of Topeka, for the purpose aforesaid, and the supplying of consumers with natural gas therefrom, shall, to that extent, be taken and held to be a sufficient compliance, by said Consumers Light, Heat and Power Company, its successors and assigns, with the obligation resting upon them to lay and construct mains and pipes for the distribution of natural gas within said City of Topeka, and that so long as such mains and pipes shall be used by said Consumers Light, Heat and Power Company, its successors or assigns, for the supplying of natural gas there-

from to consumers within said City of Topeka, said the Excelsior Coke and Gas Company of Topeka, its successors and assigns, shall be relieved from the obligation resting upon them to supply artificial or manufactured gas therefrom to consumers within said city.

But it is understood and agreed that the provisions of Section 8 of the franchise contract of the Excelsior Coke and Gas Company in regard to free service pipes and meters shall govern, and that all service pipes and meters used by the Continental Oil and Gas Company or the Consumers Light, Heat and Power Company, or their successors or assigns, shall be put in free of charge to consumers.

As a consideration for the granting of the rights and privileges herein, the said Consumers Light, Heat and Power Company, binds and obligates itself, its successors or assigns to have natural gas in the mains and to be ready to furnish natural gas in the mains in the City of Topeka on or before January 1st, 1906; saving to said company, its successors or assigns the benefit of any delays caused by riots, strikes, floods or *bona fide* legal proceedings.

And as a guarantee of good faith and performance, the said Consumers Light, Heat and Power Company, its successors or assigns, agree to deposit with the city treasurer of said city at or prior to the time of the acceptance of this ordinance, the sum of \$5,000.00 in cash, the conditions of which said deposit are as follows: If said the Consumers Light, Heat and Power Company, its successors or assigns, shall fail to have natural gas in the mains and to be ready to furnish natural gas in the mains in the City of Topeka on or before January 1st, 1906, subject to the saving clause hereinbefore set forth, then the said sum of \$5,000.00 shall be forfeited to and become the

property and money of the City of Topeka, and shall be turned over to the general revenue fund of said city; but if said Consumers Light, Heat and Power Company, its successors or assigns shall have natural gas in the mains and be ready to furnish natural gas in the mains in the City of Topeka on or before January 1st, 1906, subject to the said saving clause hereinbefore set forth, then the said sum of \$5,000.00 shall be returned to said company, its successors or assigns.

Sec. 571. FAILURE OF NATURAL GAS. Sec. 2. If at any time, for any reason, said Consumers Light, Heat and Power Company, its successors or assigns, shall, on account of the failure of a sufficient supply of natural gas, or otherwise, cease or be unable to supply consumers, within said City of Topeka, with natural gas through said mains and pipes, said the Excelsior Coke and Gas Company of Topeka, its successors or assigns, shall immediately resume the supply of artificial or manufactured gas to consumers within said city in accordance with its obligations now existing in that behalf, so long as such failure of the supply of natural gas shall continue.

Sec. 572. ACCEPTANCE. Sec. 3. Unless said the Excelsior Coke and Gas Company of Topeka and said Consumers Light, Heat and Power Company shall, within twenty (20) days after this ordinance takes effect, file with the city clerk of said city, their written acceptance of this ordinance, and deposit the \$5,000.00 in cash as hereinbefore provided for, this ordinance shall become null and void; and upon such acceptance being filed, and the deposit of said \$5,000.00 in cash as aforesaid, this ordinance shall become a valid and binding contract between said City of Topeka and said the Excelsior Coke and Gas Company of Topeka and Consumers Light, Heat and Power Company, their respective successors and assigns.

TAKE EFFECT. Sec. 4. This ordinance shall take effect and be in force from and after its publication in the city official paper.

Passed the council May 1st, 1905.

Approved May 3d, 1905.

W. H. Davis, Mayor.

Attest: J. H. Squires, City Clerk.

(Acceptance of this ordinance filed by each of the foregoing companies on May 16, 1905.)

### **Exhibit "E."**

Published in the OAKLAND BLADE, July 6, 1906.  
ORDINANCE NO. 32.

*An Ordinance* granting to the Consumers Light, Heat and Power Company, a corporation, its successors and assigns, for a period of twenty (20) years, the right to construct, maintain and operate gas works together with the right to use all streets, avenues, alleys, parkways and public grounds and places, in the City of Oakland, Kansas, for the purposes of laying, maintaining and operating mains and pipes for supplying and distributing manufactured and natural gas, or either of them, in said City of Oakland for illuminating, heating, manufacturing and other purposes and fixing the maximum rates for the sale thereof.

*Be it ordained by the Mayor and Councilmen of the City of Oakland, Kansas:*

Section 1. That subject to all the provisions, conditions and qualifications of this ordinance, the Consumers Light, Heat and Power Company, a corporation, its successors and assigns, is hereby granted the right and privilege of constructing, acquiring, operating and maintaining gas works in said City of Oakland for the purpose of manufacturing gas to be used for illuminating, heating, manufacturing and other purposes, and of constructing, acquiring, laying, using and maintaining

in, through and along the public streets, avenues, alleys, parkways and public grounds and places within the present and future limits of said City of Oakland, mains and pipes for distributing, supplying and selling manufactured and natural gas, or either of them, for illuminating, heating, manufacturing and other purposes, to the said City of Oakland and the inhabitants thereof, for transmitting and conveying the same through mains and pipes for the purposes of distributing and supplying manufactured and natural gas, or either of them, for illuminating, heating, manufacturing and other purposes, to other municipalities and territory and the inhabitants thereof, for the full period of twenty (20) years from the date of the acceptance of this ordinance, as hereinafter provided.

Section 2. That in making any and all improvements and excavations, and in exercising any and all rights and privileges, granted by this ordinance, the same shall be done by said Consumers Light, Heat and Power Company, its successors and assigns, in accordance with the lawful ordinances of said City of Oakland, and in strict compliance with each and all of the conditions, terms, and directions, and subject to each and all of the penalties and liabilities imposed by the lawful ordinances of said City of Oakland. All excavations, and other work or improvements, affecting the use of the streets, avenues, alleys, parkways and public grounds and places of said City of Oakland, shall be done under the general direction and supervision of the city engineer of said city.

Section 3. That said Consumers Light, Heat and Power Company, its successors and assigns, shall save said City of Oakland harmless from all costs, damages and expenses for the payment of which said city may become liable to any person, company or corporation, by reason of the

granting of the rights and privileges herein or by reason of the construction, operating or maintenance of said gas plant or by reason of said company's failing to conform to, or comply with, any of the provisions or requirements herein or in any other of the lawful ordinances of said city.

Section 4. That said Consumers Light, Heat and Power Company, its successors and assigns, shall not, during said period of twenty (20) years charge any of the inhabitants of said City of Oakland more than one dollar and twenty-five cents (\$1.25) per thousand cubic feet of manufactured gas, furnished by said company, or more than forty-five cents (45c) per thousand cubic feet of natural gas furnished by said company for domestic purposes, or more than thirty cents (30c) per thousand cubic feet of natural gas furnished by said company for manufacturing purposes, nor shall said company charge the inhabitants of Oakland a higher rate than is being charged in City of Topeka. Said company, its successors and assigns shall not, at any time during said period of twenty (20) years, charge said City of Oakland for gas used by said city, a higher rate than the lowest current rate charged any of its consumers for the same kind of gas used for domestic purposes.

Section 5. That said Consumers Light, Heat and Power Company, its successors and assigns, shall also provide and furnish to said City of Oakland natural gas, so long as said company shall be able to supply same, for any number of incandescent lights, according to the American Meter Company's standard for all night lighting, which may be required by said city, and at such rates as may be agreed upon, not exceeding fifty cents (50c) per light per month, payable monthly; said city to furnish lamp posts, burners and equipment and to provide, at its own expense for lighting, extin-

guishing, cleaning and keeping said street lights in good order and repair, said lights not to burn to exceed twelve (12) hours during any twenty-four (24) hours.

Section 6. Said Consumers Light, Heat and Power Company, its successors and assigns, shall lay not less than eight (8) miles of gas mains within said City of Oakland within eighteen (18) months from the date of the acceptance of this ordinance as hereinafter provided.

Section 7. Said Consumers Light, Heat and Power Company, its successors and assigns, shall have the right to charge any consumer of its gas a minimum charge of fifty cents (50c) per month per meter for each and every month in which the consumption of gas shall amount, at current rates, to less than fifty cents (50c) per meter.

Section 8. Said Consumers Light, Heat and Power Company, its successors and assigns, shall have the right to make all reasonable rules and regulations for the prevention of loss or waste in the conduct and management of its business and the sale and distribution of gas to the consumers as may from time to time be deemed necessary and may make and enforce, as part of the conditions upon which it will supply gas to consumers, such reasonable rules and regulations as are consistent with the law.

Section 9. That within ten (10) days after the passage and approval of this ordinance, the said Consumers Light, Heat and Power Company shall file with the City Clerk of said City of Oakland its acceptance, in writing, of the provisions, terms and conditions of this ordinance, which said acceptance shall be duly acknowledged before some officer authorized to administer oaths. This ordinance, unless so accepted, shall become null and void, but, when so accepted, shall be and constitute a contract between said City of Oakland and said Con-

sumers Light, Heat and Power Company, its successors and assigns, subject to the provisions and limitations hereinbefore set forth.

Section 10. This ordinance shall take effect and be in force from and after its acceptance by said Consumers Light, Heat and Power Company, as aforesaid, and its publication in the official city paper.

Passed the Council July 2, 1906.

Approved July 2, 1906.

(Seal)

DON COFFMAN, *Mayor.*

F. E. BROWN, *City Clerk.*

### **Exhibit "F."**

Kansas Natural Gas Company,

Independence, March 6, 1916.

Mr. L. G. Treleaven, Receiver,

Consumers Light, Heat and Power Co.,

Topeka, Kansas.

Dear Sir:—

In reply to your letter of March 3rd, regarding the gas service, will say that at our hearing before the Public Utilities Commission last April, we told the Commission that the rate must be increased in order to give service. We said it would be necessary to construct about 60 miles of 16" pipe line in order to get gas; that we were now carrying the gas 250 miles and that we had to reach new fields in order to get a supply. The same condition exists today that did a year ago. We cannot make extensions at the present rate, and unless extensions are made there will be no gas.

The price of pipe has increased, and a 16" line built this summer will cost us \$3,000.00 a mile more than it would if we had built it last summer. The war conditions have stimulated the smelters. In every place they have increased the size of their plants, new smelters are being constructed, and

where two years ago they could not pay more than 8c for gas they are now ready and willing to pay 12c, and in fact the smelter people tell me that they would pay 15c rather than to do without it.

The Governor of the State and the Public Utilities Commission all had this information a year ago. We are still fighting for a higher rate, and if we don't get it there will be no more gas next winter than we had this winter.

Yours very truly,

(Signed) J. M. LANDON,

*Receiver.*

### **Exhibit "G."**

At a regular session of the Public Utilities Commission of the State of Kansas, held at its office in Topeka, Kan., this 10th day of December, A. D. 1915.

JOSEPH L. BRISTOW,

JOHN M. KINKEL,

C. F. FOLEY,

*Commissioners.*

JOHN M. LANDON and R. S. LITCHFIELD, Receivers  
for Kansas Natural Gas Company, a Corporation,  
Complainants,

vs.

THE CITIES OF LAWRENCE, TOPEKA, KANSAS CITY,  
LEAVENWORTH, ATCHISON, OAKLAND, MERRIAM,  
OLATHE, EDGERTON, LE LOUP, PRINCETON,  
WELDA, FORT SCOTT, PARSONS, PITTSBURG,  
WEIR, COLUMBUS, ALTAMONT, COFFEYVILLE,  
MOUND CITY, ELK CITY, TONGANOXIE, BALDWIN,  
ROSEDALE, LENEXA, GARDNER, WELLSVILLE,  
OTTAWA, RICHMOND, COLONY, THAYER,  
GALENA, CHEROKEE, SCAMMON, OSWEGO, LIBERTY,  
CANEY, MOUND VALLEY, INDEPENDENCE,  
REDFIELD;

THE LAWRENCE CITIZENS LIGHT & POWER COM-  
 PANY,  
 THE CONSUMERS LIGHT, HEAT & POWER COM-  
 PANY,  
 L. G. TRELEAVEN, Receiver of The Consumers  
 Light, Heat & Power Company,  
 THE WYANDOTTE COUNTY GAS COMPANY,  
 WILLARD J. BREIDENTHAL and JOHN F. OVER-  
 FIELD, Receivers for the Wyandotte County Gas  
 Company,  
 THE LEAVENWORTH LIGHT, HEAT & POWER COM-  
 PANY,  
 THE ATCHISON RAILWAY, LIGHT & POWER COM-  
 PANY,  
 THE HOME LIGHT, HEAT & POWER COMPANY,  
 THE KANSAS GAS & ELECTRIC COMPANY,  
 THE O. A. EVANS & COMPANY,  
 THE TONGANOXIE GAS & ELECTRIC COMPANY,  
 CENTRAL GAS COMPANY,  
 THE COFFEYVILLE GAS & FUEL COMPANY,  
 THE UNION GAS & TRACTION COMPANY,  
 THE WEIR GAS COMPANY,  
 THE OTTAWA GAS & ELECTRIC COMPANY,  
 THE ELK CITY GAS & FUEL COMPANY,  
 THE PARSONS NATURAL GAS COMPANY,  
 THE AMERICAN GAS COMPANY,  
 THE FORT SCOTT GAS COMPANY,  
 THE OLATHE GAS COMPANY,  
 THE LIBERTY GAS COMPANY,  
 FORT SCOTT & NEVADA LIGHT, HEAT, WATER &  
 POWER COMPANY,  
 THE CENTRAL GAS COMPANY,  
 GUNN PIPE LINE COMPANY,  
 THE MORAN GAS COMPANY, and  
 THE KANSAS FARMERS GAS COMPANY,  
 Respondents.

## Docket 1035.

## ORDER.

This case being at issue upon the complaint and application for rehearing, and the responses filed, and having been duly heard and submitted by the parties, October 27, 1915, and full investigation of the matters and things involved having been had, and the Commission having on this 10th day of December, 1915, made and filed its opinion containing its findings of fact and conclusions thereon, which said opinion is hereby referred to and made a part thereof;

IT IS THEREFORE BY THE COMMISSION ORDERED, that the complainants are authorized to file with the Public Utilities Commission and collect the following schedule of net rates for the sale of natural gas by them, or through their distributing companies, to the public in the state of Kansas, to-wit:

For domestic gas in Montgomery county, except Elk City, 23 cents per thousand cubic feet; for domestic gas in Elk City, 25 cents per thousand cubic feet; for boiler gas in Montgomery county, 10 cents per thousand cubic feet; for domestic gas in all other counties and cities other than those supplied by the Gunn Pipe Line, 28 cents per thousand cubic feet; and to all consumers supplied by the Gunn Pipe Line, 30 cents per thousand cubic feet; and for all boiler gas, except in Montgomery county,  $12\frac{1}{2}$  cents per thousand cubic feet.

IT IS FURTHER ORDERED, that the parties hereto be authorized and permitted to make a minimum charge of 50 cents per month per subscriber, for readiness to serve; that the complainants receive their contract share of the collections for gas actually delivered and the residue of the minimum bill, when there is any, shall go to the distributing company. Collection rules and the rules relating

to loss arising from uncollected accounts shall remain as at present until further ordered.

IT IS FURTHER ORDERED, that the parties hereto are hereby authorized and permitted to discontinue the furnishing or supplying of so-called free gas to cities, notwithstanding it may be furnished in compliance with ordinances or franchise agreements.

That the parties hereto are further authorized and permitted to discontinue the furnishing or supplying of free gas to any person or corporation for any reason whatsoever.

This order shall become operative and effective within thirty days after the service of a duly certified copy thereof.

BY ORDER OF THE COMMISSION.

Carl W. Moore, *Secretary*.

O. K.

Joseph L. Bristow,

John M. Kinkel,

C. F. Foley,

*Commissioners*

### **Exhibit "H."**

IN THE DISTRICT COURT OF MONTGOMERY  
COUNTY, KANSAS.

State of Kansas,

*Plaintiff,*

vs.

No. 13476

The Independence Gas

Company *et al.*,

*Defendants.*

Findings of Fact, Conclusions of Law and Order  
on the Validity and Adoption by the Receiver  
of the Supply Contracts Between the Kansas  
Natural Gas Company and the Various Dis-  
tributing Companies.

Now on this 16th day of October, A. D. 1916,  
this cause comes on for hearing on the applica-

tion of John M. Landon, as Receiver of the Kansas Natural Gas Company, for instructions regarding the supply contracts between the Kansas Natural Gas Company and the various distributing companies, whether the Receiver has by his acts adopted said contracts, and the motions of Wyandotte County Gas Company, the Kansas City Pipe Line Company, the Kansas Natural Gas Company, and the State of Kansas. And the court, after hearing the evidence and the argument of counsel, and being fully advised in the premises, makes the following findings, reserving for future determination the other questions submitted:

1. The Kansas Natural Gas Company, prior to April 30, 1912, had supply contracts with the following distributing companies, to-wit:

Elk City Oil & Gas                      Elk City, Kansas.

Company,

Coffeyville Gas & Fuel      Coffeyville, Kansas

Co.,

Liberty Gas Company,      Liberty, Kansas.

American Gas Com-      Altamont, Kan.

pany,

Oswego, Kan.

Columbus, Kan.

Scammon, Kan.

Galena & Empire, Kan.

Cherokee, Kan.

Weir City Gas Com-      Weir City, Kan.

pany,

Home Light, Heat &

Power Co.,

Kansas Gas & Electric      Pittsburg, Kan.

Co., lessee,

Parsons Natural Gas      Parsons, Kan.

Co.,

O. A. Evans & Co.      Thayer, Kan.

(Thayer Gas Plant),

Union Gas & Traction Company,	Colony, Kan. Welda, Kan. Richmond, Kan. Princeton, Kan. Baldwin, Kan. Wellsville & LeLoup, Kan. Edgerton, Kan. Gardner, Kan. Lenexa, Kan. Merriam & Shawnee, Kan.
Ottawa Gas & Electric Co.,	Ottawa, Kan.
Citizens Light, Heat & Power Co.,	Lawrence, Kan.
Consumers Light, Heat & Power Co.,	Topeka, Kan.
Ft. Scott Gas & Electric Co.,	Ft. Scott, Kan.
Tonganoxie Gas & Electric Co.,	Tonganoxie, Kan.
Leavenworth Light, Heat & Power Co.,	Leavenworth, Kan.
Atchison Ry., Light & Power Co.,	Atchison, Kan.
Wyandotte County Gas Co.,	Kansas City, Kan.
Olathe Gas Company,	Olathe, Kan.
Kansas City Gas Company,	Kansas City, Mo.
St. Joseph Gas Company,	St. Joseph, Mo.
Weston Gas Company,	Weston, Mo.

Fort Scott & Nevada  
Light, Heat, Water  
& Power Company.

Moran, Kan.  
Bronson, Kan.  
Nevada, Mo.  
Deerfield, Mo.

Oronogo Gas Company, Oronogo, Mo.  
Carl Junction Gas Com- Carl Junction, Mo.  
pany,  
Joplin Gas Company. Joplin, Mo.

2. Certain of said contracts were declared illegal by the Supreme Court of Kansas on April 30, 1912, and Kansas Natural was enjoined from operating under them. (See Exhibit "A" hereto attached.) Except in the case of the Leavenworth Company, no new contracts were ever executed with the distributing companies. When the Receivers were appointed by the United States Court for Kansas Natural on October 9, 1912, there were no valid contracts with the distributing companies except with Leavenworth. This court on February 15, 1913, found all the contracts with the distributing companies to be illegal, and there appears to be no reason for changing its findings in that respect. (See pages 12, 13 and 24 of said findings as printed.) Neither the Receivers of this court, nor of the United States Court, appointed for Kansas Natural, have ever adopted any of said contracts, nor have any of said Receivers operated under them, but have continued to transport gas to said distributing companies under a method of dealing similar to that employed by the Kansas Natural. Such arrangement was temporary and not intended to be permanent or binding upon the said Receiver. In the distribution of natural gas through said distributing companies, the Receiver of this court, and of the said United States Court, treated the supply contracts the same as they did the lease

of the Kansas City Pipe Line Company, and in *Kansas City Pipe Line Company v. Fidelity Title & Trust Company* (217 Fed. 187, l. c. 195), the United States Circuit Court of Appeals held that this Receiver had not by his method of conducting the business adopted the lease-contract of the Kansas Natural with the Pipe Line Company.

3. That all of said distributing contracts contain provisions substantially as follows:

"That whereas the party of the first part is the owner of a large acreage of gas leases with a number of gas wells drilled thereon in the gas belt of Kansas, and desires to find a market for its product. \* \* \*

Now, therefore, this agreement witnesseth: That the party of the first part agrees to lay and complete \* \* \* a pipe line for conveying natural gas from the gas fields of Kansas to a point at the city limits of the City of ..... \* \* \*

However, as the production of gas from the wells, and the conveying of it over long distances, is subject to accidents, interruptions and failures, the party of the first part does not, by this contract, undertake to furnish the parties of the second part with an uninterrupted supply of gas for the period named herein, but only to furnish such a supply for such a period of time as the wells and pipe lines supplying gas to the parties of the second part are capable of supplying, and in case of its inability to fully supply all of the cities and towns with which it is connected, the gas supplied under this contract shall, at all times, be a *pro rata* share of the total deliveries of gas. And it is expressly understood and agreed by the parties of the second part and the party of the first part, that the party of the first part shall not be liable for any loss, damage or injury to the parties of the second part that may result directly or indirectly from such shortages or interruptions; but said

party of the first part agrees to use diligence to supply the said parties of the second part with a constant and adequate supply of merchantable gas for all consumers. \* \* \*

At the time these contracts were entered into and the franchises granted, it was a matter of common knowledge that the natural gas was to be transported from the gas field in and north of Montgomery County, Kansas. Since the execution of said contracts the Kansas Natural Gas Company and its Receiver have year by year been obliged to extend their pipe lines farther and farther south to secure an additional supply of gas, the production by the Receiver in Kansas having diminished to less than 5 per cent of all the gas furnished by him. The securing of natural gas in Oklahoma at the points where the Receiver is now securing the bulk of the natural gas supplied was not in contemplation of the parties at the time the contracts were made. These supply contracts are improvident, wasteful and destructive of the property under the control of the Receiver. It is no longer possible to furnish even an appreciable supply of gas from the wells of the Kansas Natural Gas Company or those under its control. It was the intention of the parties under the foregoing provisions that the supply mentioned under such contract was to be from the "wells and pipe lines" of the Kansas Natural, in Kansas, and when the time came that the supply of gas did not come from the wells of the Kansas Natural, then the happening of the event mentioned in the above condition of the contract occurred and the contract by its own terms ceased to be binding upon the parties thereto.

4. The contracts with the Wyandotte County Gas Company and the Kansas City Gas Company are almost identical in terms. These contracts were originally made with the Kansas City Pipe

Line Company. The contract with the Wyandotte County Gas Company is dated February 1, 1906, while that with the Kansas City Gas Company is dated December 3, 1906, the latter contract supplanting the contract of November 17, 1906, between the same parties. Both of these contracts contain the provision mentioned in Finding No. 3, and also contain the following provision:

"So long as the party of the first part is able to supply the same, the party of the second part agrees to buy from the party of the first part all the gas it may need to fully supply the demand for domestic consumption in the said City of Kansas City, Kansas, or elsewhere in Wyandotte County, and to pay to the party of the first part for the natural gas it shall receive from said party of the first part for all purposes during the first two years a sum equal to sixty per cent of its gross receipts from the sale of such natural gas in said City of Kansas City, or elsewhere in Wyandotte County, and thereafter a sum equal to sixty-two and one-half per cent of such gross receipts. The party of the second part makes no agreement with the party of the first part respecting the rates at which it shall sell natural gas to any consumers in Kansas City, Kansas, or elsewhere in Wyandotte County, but expressly reserves to itself the right to charge its consumers for natural gas any rates not exceeding those mentioned in said ordinance which it may agree upon with such consumers; but if it shall at any time agree to sell gas to domestic consumers or any persons other than manufacturers at less than the maximum rates mentioned in said ordinance, or to sell gas to manufacturers at a less rate than fifteen cents per thousand cubic feet, and the party of the first part shall be unwilling to accept as its compensation therefor sixty or sixty-two and one-half per cent, as the case may be, of the gross receipts of the party of the

second part, as aforesaid, for gas so sold, the party of the first part shall be under no obligations to furnish the gas so sold at such lower prices, and the party of the second part shall be at liberty to obtain the same from such other sources as it may find available."

The contract with the Kansas City Gas Company substitutes the words "Kansas City, Missouri," for "Kansas City, Kansas," and "Jackson County" for "Wyandotte County." The further exclusive provision was inserted in the contract:

"It is agreed between the parties hereto that if at any time during the period of said ordinance while the party of the second part is buying from the party of the first part all the natural gas it is distributing and selling in the said City of Kansas City, Kansas, and elsewhere in Wyandotte County, the said party of the first part, its assigns, lessee or lessees, shall furnish any natural gas to any person or corporation for use in supplying said City of Kansas City, Kansas, or any of its inhabitants, and any city, town or village, or their inhabitants elsewhere in Wyandotte County, with such gas, otherwise than under this agreement, then, and in any such case, the provision contained in Section No. 2 hereof in the following words: 'but if it shall at any time agree to sell gas to domestic consumers or any persons other than manufacturers at less than the maximum rates mentioned in said ordinance, or to sell gas to manufacturers at a less rate than fifteen cents per thousand cubic feet, and the party of the first part shall be unwilling to accept as its compensation therefor sixty or sixty-two and one-half per cent, as the case may be, of the gross receipts of the party of the second part as aforesaid, for gas so sold, the party of the first part shall be under no obligation to furnish the gas so sold at such lower prices,' shall at once become inoperative and

cease to have any effect, but the party of the first part, its assigns, lessee or lessees, shall be bound to supply and deliver to the party of the second part natural gas to fully supply the demand for all purposes of consumption in said City of Kansas City, Kansas, and elsewhere in Wyandotte County, for sixty or sixty-two and one-half per cent, as the case may be, of the gross receipts of the party of the second part from the sale of natural gas in said City of Kansas City, Kansas, and elsewhere in Wyandotte County, at any prices for which the said party of the second part may choose to sell the same."

A like provision was inserted in the contract with the predecessors of the Kansas City Gas Company. Both of these distributing contracts containing exclusive provisions, are violative of the statutes of the State of Kansas and the United State and against public policy and therefore void.

5. The obligations of these two contracts were assumed by the Kansas Natural under the lease of January 1, 1908, between the Kansas City Pipe Line Company and the Kansas Natural, the pertinent terms of said lease being as follows:

"The lessee agrees that if the gas wells hereby demised situated in the territory of the Lessor do not furnish a sufficient volume of gas, or if the pipe line of the Lessor shall not have a delivery capacity sufficient to supply the demands for gas in the cities of Kansas City, Kansas, and Kansas City, Missouri, it, the Lessee, will supplement said gas supply from its own wells up to an amount equal to fifty (50) per cent of the gas which by the use of due diligence in connecting existing wells and drilling new ones, it may be able to produce from the territory now or hereafter controlled by it; and will construct at its own cost and expense, or, so far as any of the bonds of the

Lessor in this lease referred to may be available for the purpose, at the cost and expense of the Lessor, the additional pipe lines necessary for the delivery of gas to supply such demands, whether from the Lessor's or the Lessee's territory. Provided, however, that if the expectation of continuance of the supply of gas shall not be sufficient to warrant the laying of an additional pipe line at any time, the Lessee shall not be required to do so, whatever the demand for gas in said cities; Provided, further, that it is the intent of the parties that the provisions of this clause shall not be so construed as to in effect require the Lessee to lay a line for manufacturing purposes mainly or only."

It appears from the foregoing that the Kansas Natural Gas Company only assumed to furnish gas so long as there was a supply available in the territory contiguous to the line of the Kansas City Pipe Line Company. There is now no natural gas available in appreciable quantities in such territory. By the terms of the lease with Pipe Line Company, the Kansas Natural agreed to supplement the supply of the gas from the gas wells situated in the territory of the lessor by natural gas produced from the wells drilled by Kansas Natural in territory controlled by it. The Kansas Natural has done so. The Receiver now, however, is producing no appreciable amount of gas from said territory, but the natural gas now furnished by him is nearly all purchased in Oklahoma at far distant points from producing companies over which the Receiver has no control. Neither the Receiver nor the Kansas Natural is now able to furnish any appreciable supply of gas from either the wells situated in the territory of the Pipe Line Company or wells in territory controlled by the Kansas Natural.

6. The Kansas Supreme Court in the case of *State v. Wyandotte County Gas Company*, 88 Kan. 165, and the *United States Supreme Court in Wyandotte County Gas Company v. State*, 231 U. S. 622, decided that the City of Kansas City, Kansas, never had power to make the contract with the Wyandotte County Gas Company fixing rates, and that the ordinance passed by the City of Kansas City, Kansas, attempting to make such contract is void. Under these decisions the supply contract is invalid, the consideration having failed.

7. The Kansas Supreme Court in the case of *State ex rel. v. Litchfield*, 97 Kan. 592, decided that a distributing company, which is an agent of the Kansas Natural, cannot rely upon the franchise ordinance made for the purpose of fixing rates, it having been abrogated by the Public Utilities Act of Kansas, in so far as the question of rates is concerned. Since these supply contracts are all based upon the franchise ordinances (which are in general made a part of the supply contracts) and the consideration for the delivery of gas by the Kansas Natural is the collection by the distributing companies of the maximum rates prescribed in such ordinances in the respective cities, and such ordinances are now abrogated and the rates prescribed therein can no longer be collected, and have not been collected by the distributing companies for the several years last past, and since they have not made settlement with the Receiver on the basis of the franchise rates, these supply contracts are not binding on the Receiver.

#### CONCLUSIONS OF LAW.

1. That neither the Receiver of this court, nor the Receivers of the United States Court have by their acts or otherwise adopted any of the supply contracts with the various distributing companies.

2. That the supply contracts with the distribut-

ing companies, whose plants are located within the State of Kansas, are invalid, illegal and void, being in violation of the laws of this state and of the United States, and are not binding on the Receiver.

3. That the supply contracts with the distributing companies, whose plants are located in the State of Missouri, are invalid, illegal and void, being in violation of the laws of the State of Missouri and of the United States, and are not binding on the Receiver.

4. That the conditions mentioned in the various supply contracts upon the happening of which the contracts were to become inoperative and void have long since occurred, and the Receiver is unable to furnish the distributing companies with gas under the terms of said supply contracts.

5. That the said supply contracts are improvident, wasteful and destructive of the estate of the Kansas Natural Gas Company and should be disavowed.

#### ORDERS.

It is therefore considered, adjudged and decreed that none of the distributing contracts aforesaid are binding upon, or effective against, said Receiver, and that he should not, and is hereby forbidden to, deliver natural gas to any of said distributing companies under the distributing contracts formerly existing between the Kansas Natural Gas Company and said distributing companies, respectively; and he is hereby ordered to deliver natural gas to such of said distributing companies as will receive the same at the rates and prices, and on the terms named in the schedule of rates and prices heretofore promulgated by said Receiver to said distributing companies, respectively; and the acts of said Receiver, in promulgating said schedules are hereby approved.

And this Court recognizing that its power does not extend beyond the State of Kansas, hereby directs said Receiver to present to the United States District Court for the District of Kansas, First Division, the foregoing findings of fact and conclusions of law and this order, and to pray said Federal Court for such orders as will effectuate the law applicable to the Kansas Natural property in Missouri and Oklahoma, and thus bring the same in operative harmony with the Kansas Natural property in Kansas, to the end that the public may be served and said property preserved.

THOS. J. FLANNELLY,

*Judge.*

### **Second.**

Section H of Exhibit — to the evidence of L. G. Treleaven, Receiver (being the report of Henry I. Lea), copy of which is on file with the clerk of this court as part of the record, gives a detailed statement of the reproduction cost and rate-making value of the property of The Consumers Light, Heat and Power Company for the years 1907 to 1916, inclusive, and shows that the value was—

For 1908.....	\$1,265,741.85
For 1909.....	1,317,499.13
For 1910.....	1,376,002.72
For 1911.....	1,421,311.58
For 1912.....	1,471,272.27
For 1913.....	1,540,906.85
For 1914.....	1,663,588.81
For 1915.....	1,783,461.59
For 1916.....	1,917,523.00

And the letter of transmittal found in said exhibit shows that the present depreciated value of

said company, figured on the basis of depreciable property, only, is \$1,763,068.00.

Section D of said Exhibit — shows that under the various rates which have been in force since 1908 (after fully setting out operating cost, depreciation and taxes, etc.) the Consumers Light, Heat and Power Company has failed to earn an adequate return on the proper rate-making value of the company, and that since 1913 it has failed to earn an amount sufficient to pay bond interest, as follows:

Short, 1913.....	\$37,252.79
Short, 1914.....	48,035.76
Short, 1915.....	61,897.08
Short, 1916.....	42,454.48
Short, 1917.....	40,814.48

Said exhibit further shows that the amount of outstanding bonds on the property is one million dollars.

### **Third.**

Special attention is called to Section 6 of Exhibit "A" to the amended and supplemental answer of L. G. Treleaven, Receiver of Consumers Light, Heat and Power Company, being the franchise ordinance under which natural gas is distributed in the city of Topeka, which provides that:

"The said company shall not charge for the use of gas it may furnish to said city, or any

of the inhabitants thereof, during said twenty years, a price greater than 45 cents per thousand feet for domestic purposes, and 30 cents per thousand feet for manufacturing purposes."

Respectfully submitted,

LEONARD S. FERRY,

THOMAS F. DORAN,

M. F. COSGROVE,

*Solicitors for L. G. Treleavan,  
Receiver of The Consumers  
Light, Heat and Power Com-  
pany of Topeka, Kansas.*

J. M. CHALLIS,

*Solicitor for The Atchison Rail-  
way, Light and Power Company  
of Atchison, Kansas.*

FLOYD HARPER,

*Solicitor for The Leavenworth  
Light, Heat and Power Com-  
pany of Leavenworth, Kansas.*

FILED

OCT 2 1918

JAMES D. MAHER,  
CLERK.

# Supreme Court of the United States

October Term, 1918.

No. 277.

THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS, ET AL.,  
*Appellants,*

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS  
COMPANY, ET AL.

Filed September 26, 1917.

No. 329.

KANSAS CITY, MISSOURI; THE PUBLIC SERVICE COMMISSION OF THE  
STATE OF MISSOURI, ET AL., *Appellants,*

VS.

JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL GAS COMPANY,  
ET AL.

Filed January 16, 1918.

No. 330.

KANSAS CITY GAS COMPANY, THE WYANDOTTE COUNTY GAS  
COMPANY, ET AL., *Appellants,*

VS.

KANSAS NATURAL GAS COMPANY, JOHN M. LANDON AND GEORGE F.  
SHARITT, RECEIVERS, AND FIDELITY TITLE AND TRUST COMPANY.

Filed January 14, 1918.

No. 383.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.,  
*Appellants,*

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS  
COMPANY, ET AL.

Filed February 6, 1918.

*Appeals from the District Court of the United States for the  
District of Kansas.*

## BRIEF

ON BEHALF OF JOHN M. LANDON, MANAGING RECEIVER  
OF KANSAS NATURAL GAS COMPANY, FIDELITY TITLE  
& TRUST COMPANY, KANSAS NATURAL GAS COM-  
PANY, AND GEORGE F. SHARITT, RECEIVERS OF  
KANSAS NATURAL GAS COMPANY, APPELLEES.

CHARLES BLOOD SMITH,  
*Solicitor for Fidelity Title &  
Trust Company, Appellee.*

R. A. BROWN,  
T. S. SALATHIEL,  
*Solicitors for Kansas Natural  
Gas Company, Appellee.*

JOHN H. AYWOOD,  
ROBERT STONE,  
GEORGE T. McDERMOTT,  
AUSTIN M. COWAN,  
CHESTER I. LONG,  
*Solicitors for John M. Landon,  
Managing Receiver of Kan-  
sas Natural Gas Company,  
Appellee.*

JOHN J. JONES,  
*Solicitor for George F. Shar-  
itt, Receiver of Kansas Nat-  
ural Gas Company, Appellee.*



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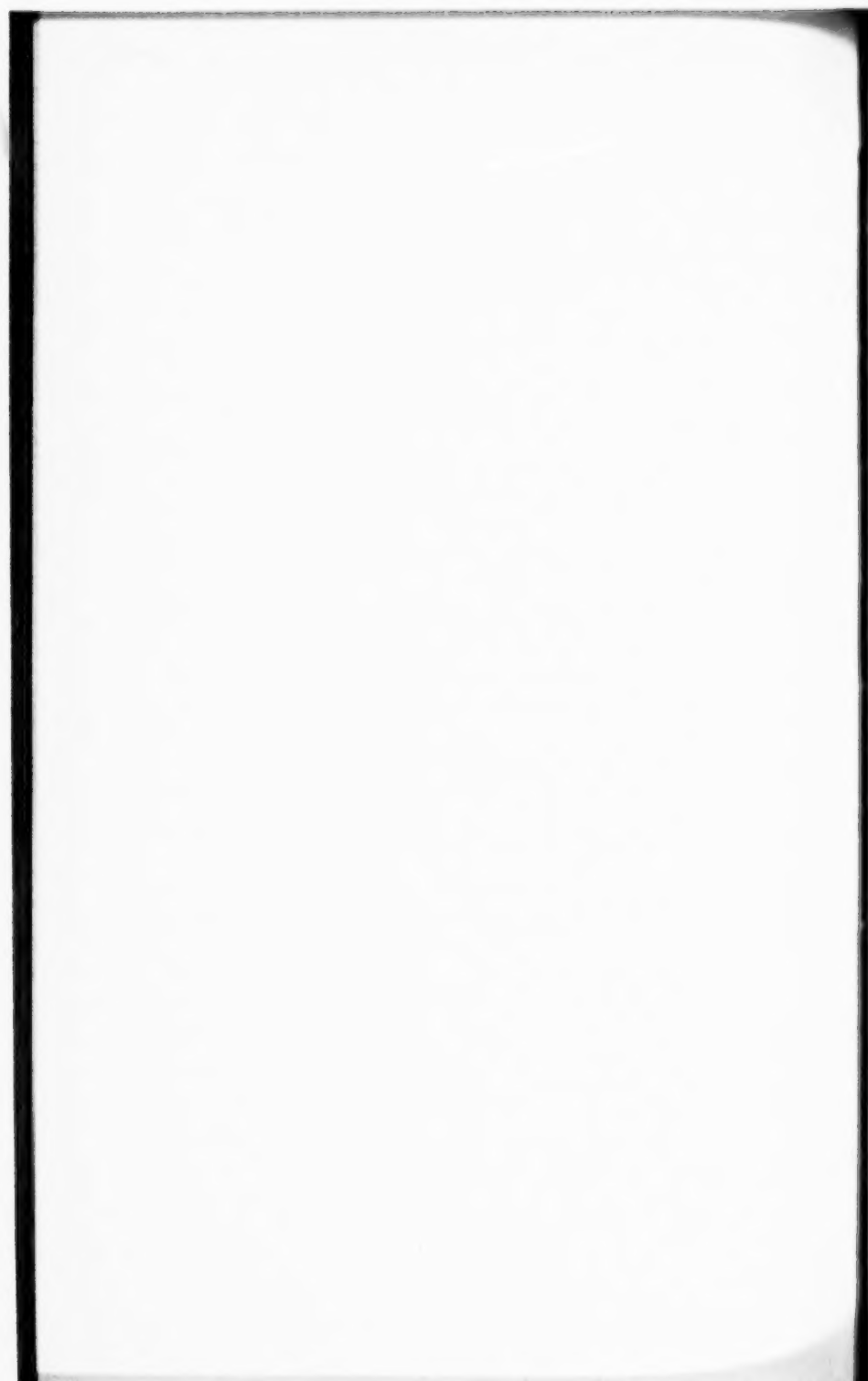
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# Supreme Court of the United States

October Term, 1918.

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**No. 277.**

THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS ET AL.,  
*Appellants,*

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS  
COMPANY, ET AL.

Filed September 20, 1917.

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**No. 329.**

KANSAS CITY, MISSOURI; THE PUBLIC SERVICE COMMISSION OF THE  
STATE OF MISSOURI, ET AL., *Appellants,*

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS  
COMPANY, ET AL.

Filed January 10, 1918.

---

**No. 330.**

KANSAS CITY GAS COMPANY, THE WYANDOTTE COUNTY GAS  
COMPANY, ET AL., *Appellants,*

VS.

KANSAS NATURAL GAS COMPANY, JOHN M. LANDON AND GEORGE F.  
SHARITT, RECEIVERS, AND FIDELITY TITLE AND TRUST COMPANY.

Filed January 14, 1918.

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**No. 353.**

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, ET AL.,  
*Appellants,*

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS  
COMPANY, ET AL.

Filed February 6, 1918.

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*Appeals from the District Court of the United States for the  
District of Kansas.*

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**BRIEF**

ON BEHALF OF JOHN M. LANDON, MANAGING RECEIVER  
OF KANSAS NATURAL GAS COMPANY, FIDELITY TITLE  
& TRUST COMPANY, KANSAS NATURAL GAS COM-  
PANY, AND GEORGE F. SHARITT, RECEIVER OF  
KANSAS NATURAL GAS COMPANY, APPELLEES.

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**STATEMENT OF FACTS.**

Owing to the extent of the litigation and com-  
plications in this case, we deem it advisable to  
make a separate statement of facts on behalf of

these appellees. References are to pages of the printed record. In order to avoid confusion we shall refer to the parties as they were arranged in the court below.

On January 5, 1912, suit was commenced in the District Court of Montgomery County, Kansas, by the Attorney General of the State of Kansas against The Kansas Natural Gas Company and other corporations, under the Anti-Monopoly Statute of the State of Kansas. (Rec., p. 13.) During the pendency of that suit, and on or about October 7, 1912, John L. McKinney, a stockholder and a holder of certain second mortgage bonds of The Kansas Natural Gas Company, filed a bill in the United States District Court for the District of Kansas, No. 1351 Equity, alleging the insolvency of The Kansas Natural Gas Company and praying the appointment of Receivers to take possession of and manage its property. (Rec., p. 14.) The Kansas Natural Gas Company confessed the allegations of the bill, and receivers were appointed on October 9, 1912, and within ten days thereafter, pursuant to requirements of Sec. 56 of the Judicial Code, the receivership was extended to the property of The Kansas Natural Gas Company within the Western District of Missouri and the Eastern District of Oklahoma. On February 3, 1913, suit was filed in the United States District Court for the District of Kansas by the Fidelity Title & Trust Company to foreclose the mortgage held by it upon the property of The Kansas City Natural Gas Company. This suit is No. 1-N, Equity, of said court. On the same date, on motion, the receivership therefore existing in

suit No. 1351 was extended on the same terms and conditions to said suit No. 1-N, Equity. (Rec., p. 14.)

On February 15, 1913, the District Court of Montgomery County, Kansas, entered judgment against The Kansas Natural Gas Company and appointed receivers therefor. Thereafter, the state receivers made application to the United States District Court for the District of Kansas for the possession of the property of The Kansas Natural Gas Company within the State of Kansas, claiming the prior jurisdiction of the District Court of Montgomery County, Kansas, over the subject matter, and this application was granted (206 Fed. 772). The judgment was affirmed by the Circuit Court of Appeals (209 Fed. 300), and on January 1, 1914, the property of The Kansas Natural Gas Company situated in the State of Kansas was delivered to the state receivers. (Rec., p. 15.) Thereafter, the state receivers made further application to the United States District Court for the District of Kansas for the delivery to them of the property located in Oklahoma and Missouri. This application was denied.

On appeal, the Circuit Court of Appeals directed that inasmuch as the system must be operated as a unit, the property in Missouri and Oklahoma should be turned over to the state receivers (217 Fed. 187.) This was done. However, in turning over the property to the state receivers the United States District Court for the District of Kansas retained potential possession of the property, and issued an injunction preventing any one except the state receivers interfering with

the property or handling it, and directing that the property should be returned to it after the state receivers surrendered possession. (Rec., p. 16.) The state receivers were immediately appointed ancillary receivers of the United States District Court for the District of Kansas for all properties and assets of The Kansas Natural Gas Company situated in the states of Oklahoma and Missouri. (Rec., pp. 18, 1018.)

On December 17, 1914, all parties concerned in the suits 1351 Equity and 1-N Equity in the United States District Court for the District of Kansas, and the parties concerned in the suit pending in the District Court of Montgomery County, Kansas, entered into an agreement called the Creditors' Agreement (Exhibit "A" to bill of complaint, Rec., p. 1009), whereby it was agreed that the state receivers should manage the property for six years upon the condition named therein in reference to the paying off of the various securities and the procuring of a compensatory rate for gas transported and sold. This agreement is of record in the United States District Court for the District of Kansas and the District Court of Montgomery County, Kansas. (Rec., p. 1018.)

On December 30, 1912, the United States District Court for the District of Kansas fixed a schedule of prices to be charged by the receivers to the distributing companies at the gates of the cities. The order was suspended and never put into effect. In January, 1913, the attorney for the Public Utilities Commission of the State of Kansas brought a proceeding before that body under

the Public Utilities Act of 1911, which act required the maintenance of rates in force on the 1st day of January, 1911, until changed by the Public Utilities Commission (bill of complaint, Rec., p. 20), and the Public Utilities Commission in that proceeding denied the federal receivers the right to increase the rates in force January 1, 1911. (Rec., p. 21.)

On July 10, 1913, the Public Utilities Commission of Kansas made an order that the federal receivers make certain extensions of the pipe lines of said companies. The receiver asked the United States District Court for the District of Kansas for instructions. The State of Kansas was represented in said proceedings. Judge Marshall held that the extensions were to be made in Oklahoma, that the business of the receiver was interstate commerce, and therefore the whole subject was beyond the jurisdiction of the Public Utilities Commission of Kansas and directed the receiver not to make the extensions. The opinion of the court is reported in 219 Fed. 614. No appeal was taken from this determination.

In April, 1915, the state receivers, pursuant to the Creditors' Agreement hereinbefore mentioned, made application to the Public Utilities Commission of Kansas to increase the rates charged since January 1, 1911. On July 16, 1915, the Public Utilities Commission of Kansas rendered its opinion (Rec., p. 22), fixing a rate of twenty-eight cents to consumers in Kansas, but made the establishment of this schedule contingent upon the establishment of the same schedule of rates in Mis-

souri by the Public Service Commission of that state. This schedule was arrived at by considering the requirements of the Creditors' Agreement and taking the life of the natural gas field as six years from January 1, 1915. Numerous errors were charged to have been made in the findings of the Public Utilities Commission of Kansas, and the order was sought to be set aside in a proceeding had in the District Court of Montgomery County, Kansas, in which it was attempted to make the Public Utilities Commission of Kansas a party. The Public Utilities Commission objected to the service and stood on their objection. The case proceeded to trial and the court made certain findings of fact (Rec., p. 22) and enjoined the enforcement of the order of the Public Utilities Commission and ordered in a rate of thirty cents. An appeal was taken by the Public Utilities Commission to the Supreme Court of the State of Kansas, and also an original proceeding in mandamus was instituted in the latter court by the Commission to compel the plaintiff receiver to observe the order of the Public Utilities Commission. The Supreme Court of Kansas on October 4, 1915, decided that the District Court of Montgomery County, Kansas, did not have proper service upon the Public Utilities Commission and therefore the District Court's order was void. The Supreme Court also held that there was no order of the Public Utilities Commission outstanding which should be enforced, and denied the writ of mandamus. (96 Kas. 372.)

A rehearing before the Public Utilities Commission was had by the receiver, and on December

10, 1915, the Public Utilities Commission rendered its opinion (Exhibit "K," Rec., p. 53) establishing a rate of 28 cents. This rate was made on a rate-making basis. The opinion was dissented from by one of the three members of the Board. Commissioner Foley in his dissenting opinion assailed the majority opinion, and stated that the 28-cent rate was not sufficient. (Rec., p. 81.)

Thereupon, plaintiff receiver put into force under protest the 28-cent rate ordered by the Public Utilities Commission, and immediately brought this suit, alleging the order was unreasonable and amounted to an undue interference with the interstate commerce conducted by the receiver. Bill of complaint states that the order is unreasonable in the following respects, to-wit: that the valuation placed by the Public Utilities Commission of Kansas on physical property is entirely too low; that the Commission has failed to allow any sum for "going value," "going concern value" or "cost of attaching the business"; has not allowed any return on the value of the leaseholds and property used in the production of gas; has made various errors in its computations; has allowed only a six per cent return on the investment, when the rate should have been ten per cent, owing to the hazardous nature of the business; has made no allowance for the necessary extension of the gas mains in Oklahoma each year; had computed the life of the field twelve years from January 1, 1915, when it should have been six years; has placed too high a "scrap value" on the plant, and has not made proper allowance for the amortization or depreciation of the plant.

This suit is also brought against the Public Service Commission of the State of Missouri because of concerted action by the Public Service Commission of Missouri with the Public Utilities Commission of the State of Kansas, and decisions and announcements of the Public Service Commission of Missouri that it will not permit a higher rate to be charged for natural gas delivered to consumers in Missouri than is charged to consumers in the border cities of Kansas. Also because it has suspended all increased rates.

This suit is also brought in the United States District Court for the District of Kansas as dependent upon and ancillary to suits No. 1-N Equity and 1351 Equity, to protect the property in the possession of the United States District Court for the District of Kansas in the states of Oklahoma and Missouri and to prevent the enforcement of the excessive penalties which might be assessed against the plaintiff receiver should he disobey the orders of the Public Utilities Commission of Kansas and the Public Service Commission of Missouri (see Rec., pp. 31, 39) and to prevent the taking of property in the hands of the ancillary receiver of said court without due process of law.

The amount in controversy exceeds the value and sum of \$3,000.00.

John L. McKinney and the Fidelity Title & Trust Company, plaintiffs in the suits in the federal court to which this action is ancillary and in which the receivers were appointed, have filed cross-bills asking the same relief prayed for by the plaintiff receiver, John M. Landon. George

F. Sharitt, one of the receivers originally appointed by the federal court, and who was retained as receiver by that court after the property was delivered to John M. Landon (originally appointed as receiver by the state court), also has filed a cross-bill asking for the same relief prayed for by John M. Landon. No one of these three cross-complainants was a party to the suits in the Supreme Court of the State of Kansas.

On the 20th day of March, 1916, R. S. Litchfield, one of the state receivers, died, and thereafter John M. Landon was made the sole receiver by the District Court of Montgomery County, Kansas, of The Kansas Natural Gas Company, and was made the sole ancillary receiver of the United States District Court for the District of Kansas for the property in Oklahoma and Missouri. These orders were entered in this cause and the suit ordered to proceed in the name of John M. Landon as the sole plaintiff.

After the filing of the bill of complaint as above set forth, the Public Utilities Commission of the State of Kansas filed a supplemental petition in the mandamus suit brought in the Supreme Court of the State of Kansas, seeking to enjoin the prosecution of the suit in the federal court and demanding that the plaintiff receiver, John M. Landon, be required to comply with the order of the Public Utilities Commission. The plaintiff receiver thereupon attempted to remove the case to the federal court. On the hearing the Supreme Court of the State of Kansas decided that the proceeding was not removable, that there was no order of the Public Utilities Commission which the plaintiff

receiver had refused to obey, that the United States District Court for the District of Kansas was a court of competent jurisdiction to determine the reasonableness of the rate established by the Commission, and had jurisdiction of this suit. (96 Kan., p. 837.) The Supreme Court of Kansas further decided that there was nothing before it for determination and dismissed the suit. (96 Kan. 833.)

The application for temporary injunction was heard by Circuit Judge Sanborn, District Judges Campbell of the Eastern District of Oklahoma and Booth of the District of Minnesota. The Missouri defendants as well as the Kansas defendants attacked the jurisdiction of the court, but all motions testing the jurisdiction of the court were overruled. (See opinion by Circuit Judge Sanborn, 234 Fed. 154.)

On June 3, 1916, a preliminary injunction was granted against the Kansas defendants, including the Public Utilities Commission of that state. (Decree, Rec., p. 294; opinion, Rec., p. 298.) Opinion reported in 234 Fed. 154.

The relief prayed for was granted on the ground that the 28-cent rate was unreasonable under the Kansas statute, confiscatory and deprived the plaintiff receiver of the property in his possession in violation of the Constitution of the United States. The three judges expressed the unanimous opinion that the plaintiff receiver was engaged in interstate commerce and that such interstate commerce was substantially burdened and unduly interfered with by the order of the Kansas Public Utilities Commission. (Rec., p. 306.)

On October 11, 1916, a supplemental bill was filed by John M. Landon as plaintiff receiver, setting forth additional acts of various defendants (especially of the Missouri Public Service Commission) amounting to a substantial burden and undue interference with the interstate commerce conducted by him. (Rec., p. 343.) On June 5, 1917, John M. Landon was discharged as receiver of the District Court of Montgomery County, Kansas, and all the property in his possession as receiver was returned to the United States District Court for the District of Kansas. John M. Landon was appointed as the active managing receiver of the property by the United States District Court for the District of Kansas. (Rec., p. 1029.)

Subsequently, after the taking of much evidence, a decree was entered in this suit by Judge Booth on July 5, 1917, permanently enjoining the enforcement of the 28-cent rate as unreasonable under the Kansas statute, confiscatory and taking property without due process of law under the Federal Constitution, and as an interference with interstate commerce conducted by the plaintiff receiver. The relief was granted not only in favor of the plaintiff receiver, but also in favor of the cross-complainants, The Kansas Natural Gas Company, George F. Sharitt as receiver, the Fidelity Title & Trust Company, and others. (Rec., p. 602.) The opinion of Judge Booth on the issues involved, including a summary of the evidence, is found at page 564 of the record. (242 Fed. 675.)

In a later hearing, involving the Missouri de-

fendants, a decree was entered permanently enjoining the Public Service Commission of Missouri and the other Missouri defendants from substantially burdening and unduly interfering with the interstate commerce conducted by the plaintiff receiver in the state of Missouri. (Rec., p. 621.) The opinion of Judge Booth, entered August 13, 1917, is found at page 615 of the record. (245 Fed. 950.) The court also held in this latter opinion that the contracts between the distributing companies and The Kansas Natural Gas Company had never been adopted by the plaintiff receiver or the court and were not binding upon the plaintiff receiver.

In October, 1916, John M. Landon, as receiver of the state court, had asked the District Court of Montgomery County, Kansas, for instructions as to the binding force and effect of these same contracts. That court determined that the contracts were not binding on the receiver of The Kansas Natural Gas Company. (Rec., p. 548.) An appeal was taken from that judgment to the Supreme Court of Kansas, where the appeal was dismissed, the court stating that there was no substantial difference between the views of the Supreme Court and the order made by the District Court. (102 Kan. 712, l. c. 717.)

An original proceeding of mandamus was instituted in the Supreme Court of the State of Kansas in September, 1916, by the Public Utilities Commission to compel the plaintiff receiver of The Kansas Natural Gas Company, the City of Olathe and The Olathe Gas Company to continue the method of doing business at Olathe until consent

to change should be granted by the Public Utilities Commission. Previous to this the City of Olathe, the plaintiff receiver, and The Olathe Gas Company, the distributing company at that point, had all agreed upon a change in practice, but the consent of the Public Utilities Commission was not secured. The Supreme Court of the State of Kansas directed that the old method of doing business be continued until the same was lawfully superseded by some court of competent jurisdiction. 100 Kan. 593, l. c. 597. Upon a supplemental hearing and the showing that Judge Booth in his decree of August 13, 1917, had decided that the distributing contracts were not binding on the plaintiff receiver, the court dismissed the proceeding. (See appendix to this brief, p. 137.)

From the decrees of July 5, 1917, and August 13, 1917, certain of the Kansas and Missouri defendants have instituted these appeals.

A controlling question in this case is whether or not the plaintiff receiver is engaged in interstate commerce of a national character in the gathering together, transportation and delivery of natural gas produced in Oklahoma to consumers in Kansas and Missouri.

The method of carrying on the natural gas business by plaintiff receiver is set out on pages 17, 18, 19 and 20 of the bill of complaint. (Rec., pp. 18-19.) Briefly, it is this:

Natural gas is furnished by the plaintiff receiver to thirty-seven cities in the state of Kansas and eight cities in the state of Missouri. These include the principal cities in eastern Kansas and western Missouri. The eight cities in Missouri,

however, consume approximately 60 per cent of all the gas produced and sold by the plaintiff receiver, while the thirty-seven cities in Kansas consume only about 40 per cent of all the gas produced and sold by the plaintiff receiver.

This is the same pipe line system as was under consideration in the case of *Haskell v. Kansas Natural Gas Company*, 224 U. S. 217, 32 S. Ct. 442; in *West v. Kansas Natural Gas Company*, 221 U. S. 229, 31 S. Ct. 564, and in *Haskell v. Cowham*, 187 Fed. 403, quoted with approval by this Court in *West v. Kansas Natural Gas Company*, *supra*. In those cases the gathering lines in Oklahoma and in Kansas, together with the main trunk lines extending from Oklahoma through Kansas into Missouri, were under consideration, and this Court decided that the gathering of the gas and transporting it from Oklahoma into Kansas constituted interstate commerce of a national character, with which the states could not interfere. The question now before this Court is whether the transportation of natural gas through those same gathering lines and the main trunk line to consumers in Kansas and Missouri continues to be interstate commerce until the natural gas is delivered to the consumers' burners. The extent and course of the pipe line system at the time of the institution of this suit is shown in Exhibit "Q." (Rec., p. 1142.) The course of gas in transportation from the well to the consumer is explained pictorially by Exhibit "R." (Rec., p. 1142.) The transportation and sale of natural gas includes the following factors: (1) Wells in the field; (2) gathering lines; (3) trunk

lines; (4) distributing company lines; (5) service lines. Each of these are shown in Exhibit "R" above referred to. This Court has already determined that the transportation of natural gas, so far as the first three factors are involved, constitutes interstate commerce of a national character. The only phases of the matter which this Court has not directly determined are the distributing company lines and the service lines.

It must be borne in mind that there is no stoppage at the connection between the distributing company lines and the main trunk lines. The two are joined together and gas moves from one to the other without any interruption. The same is true of the passage of gas from the distributing company lines into and through the service lines.

Approximately 85 per cent of all the natural gas transported and sold by plaintiff receiver is produced in Oklahoma. It is piped from various pools in Oklahoma, as far south as the county of Tulsa in that state, through the system of pipe lines belonging to the Kansas Natural Gas Company and subsidiary companies. No natural gas is sold to consumers in Oklahoma. The natural gas is started on its journey from Oklahoma with the purpose and intent of being transported and delivered to consumers in the states of Kansas and Missouri. The natural gas flows under its natural pressure so far as possible until the pressure becomes so light that the speed is greatly diminished, and then it is run into compressors, which are no more than rapidly moving pistons which compress the natural gas to a high pressure from which it is liberated and speeds on its way

much more rapidly than before. The compressors act as accelerators. There are no reservoirs or storage tanks along the lines operated by the plaintiff receiver, and the natural gas through this unit system of pipe lines is conducted to the city limits of the various cities in Kansas and Missouri, where the pipe lines of plaintiff receiver connect with the local distributing pipe lines which belong to distributing companies in the various cities. There is no interruption of the flow of the natural gas in the change from one pipe line to another, but the natural gas continues to flow under its own pressure to and through the meters of the consumers to the stoves and lamps where it is consumed. The gas moves continuously from the moment it starts on its way from the wells until it is consumed in the various cities.

The plaintiff receiver accepts as his part of the revenue in general  $66\frac{2}{3}$  per cent of the amount collected from the consumers. The local distributing company gets the balance for its services. Prior to the receivership, this division was by virtue of contracts with the distributing companies, but these contracts were declared illegal and not binding on the receiver, but the method, though not the percentage, of division of the revenue has continued the same. Except in Independence, Kansas, the receiver does not operate within the city limits of any city or distribute natural gas. The Kansas Natural Gas Company and its receivers have never been parties to any of the franchises granted the local distributing companies, nor has its receivers ever adopted the terms of any of the franchises.

Fifteen per cent of the natural gas consumed in Kansas and Missouri comes from wells in the state of Kansas. This natural gas is turned into the pipe line system operated by the plaintiff at various points, and is commingled with the natural gas of Oklahoma, so that the two cannot be separated. Of all the natural gas sold by plaintiff, 60 per cent is sold to consumers in Missouri and 40 per cent to consumers in Kansas. So of the 15 per cent of natural gas produced in Kansas 60 per cent is sold to consumers in Missouri and 40 per cent to consumers in Kansas. Forty per cent of the 15 per cent amounts to 6 per cent. Thus only 6 per cent of the total natural gas sold by plaintiff is both produced and sold in Kansas.

The method of transportation used by plaintiff receiver is the most efficient and quickest science has invented to carry natural gas from the point of production to the consumers' burners.

**Citations to Cases Involving Different Phases of  
the Kansas Natural Gas Controversy.**

*McKinney v. Kansas Natural Gas Company*, 206 Fed. 772. Opinion by Judge Marshall determining that the receiver appointed by the District Court of Montgomery County, Kansas, was entitled to the possession of the property in Kansas.

*McKinney v. Landon*, 209 Fed. 300. Affirmance by the Circuit Court of Appeals of the judgment of Judge Marshall in 206 Fed. 772.

*Kansas City Pipe Line Company v. Fidelity Title & Trust Company*, 217 Fed. 187. Decision by the Circuit Court of Appeals, Eighth Circuit, holding the entire pipe line system in Oklahoma, Kansas and Missouri constitutes a unit and should be operated as a matter of comity by the receivers appointed by the District Court of Montgomery County, Kansas.

*Fidelity Title & Trust Company v. Kansas Natural Gas Company*, 219 Fed. 614. Decision by Judge Marshall on application of federal receiver for instructions as to making extensions in Oklahoma ordered by the Public Utilities Commission of Kansas, holding that the business conducted by the receiver was interstate commerce and extensions not subject to the control of the Public Utilities Commission.

*State ex rel. v. Flannelly*, 96 Kan. 372. Decision by the Supreme Court of Kansas that the District Court of Montgomery County, Kansas, did not have jurisdiction of the Public Utilities Commission and its order setting aside the 28-

cent rate as void; also holding that the rate prescribed by the Public Utilities Commission was admittedly too low and would not be enforced by the court. This opinion contains dictum to the effect that the business conducted by the receiver is not interstate commerce—at least not of a national character.

*State ex rel. v. Flannelly*, 96 Kan. 833. Decision dismissing the case reported in 96 Kan. 372, and holding that the United States District Court for the District of Kansas is a court of competent jurisdiction under the Kansas statute to determine the reasonableness of the 28-cent rate.

*Landon v. Public Utilities Commission*, 234 Fed. 154. Opinion by three judges upon application for temporary injunction holding that the court has jurisdiction of both Kansas and Missouri defendants and that the 28-cent rate is unreasonably low and confiscatory; also stating that the receiver is engaged in interstate commerce and not subject to state regulation.

*State ex rel. v. Litchfield*, 97 Kan. 592. A determination that the plaintiff receiver and distributing company cannot change the practice at Olathe without consent of the Public Utilities Commission.

*State ex rel. v. Kansas Natural Gas Company*, 100 Kan. 593. Decision by the Supreme Court of Kansas on the Olathe situation, holding that the method of distributing gas at Olathe should be observed by plaintiff receiver and the distributing company until superseded by a lawful order.

Final judgment in the above case dismissing

the suit and recognizing that the United States District Court for the District of Kansas had superseded the Olathe contract.

*State v. Gas Company*, 102 Kan. 712. Decision dismissing the appeals of the Wyandotte County Gas Company and others from the judgment of October 16, 1916, of the District Court of Montgomery County, Kansas, holding the supply contracts not binding on the receiver.

*Landon v. Public Utilities Commission*, 242 Fed. 658. Opinion by Judge Booth on final hearing holding the 28-cent rate unreasonable and confiscatory and that the plaintiff receiver is engaged in interstate commerce, which is not subject to regulation by state authorities.

*Landon v. Public Utilities Commission*, 245 Fed. 950. Opinion by Judge Booth holding that the Missouri defendants should be enjoined from interfering with the interstate commerce conducted by plaintiff receiver and also holding that the supply contracts are not and never were binding on plaintiff receiver.

*St. Joseph Gas Company v. Barker*, 243 Fed. 206. Opinion by three judges on the St. Joseph Gas Company suit against the Public Service Commission of Missouri.

**The United States District Court for the District of Kansas has jurisdiction over the Kansas and Missouri defendants in this cause because this suit is ancillary and dependent upon suits pending in such court.**

The situation at the time of the institution of this suit is very clearly set forth by Circuit Judge Sanborn, speaking for the three judges at the time of the application for temporary injunction, on the challenge to the jurisdiction of the court. (234 Fed. 154.) After referring to the history of the litigation in the federal court, the appointment of the receivers, and the turning over of the property in Kansas to the Kansas state court, Judge Sanborn says (pp. 155, 156):

"The fact then developed that the property in Kansas, the property in Missouri, and the property in Oklahoma constituted a unit, and that it should not be divided into its three parts and separately operated, without that very spoliation and destruction that is alleged may come from non-compensatory rates, without a depreciation of the value of the property and an impracticability of wise and beneficial operation. At this time the properties in Oklahoma and Missouri were still within the jurisdiction and complete control of this court, and the court in Kansas had not then and never has had any inherent power, nor could the state of Kansas give it any power, to take, manage or control the property in Oklahoma or Missouri. It was in the power of this court at that time to order its receiver, Mr. Sharitt, to operate

the property in Oklahoma and Missouri in harmony with the receiver in Kansas. It was in its power to appoint a master, and to direct that he should see that the receiver of this court should operate in that way. It was in its power to appoint the same man receiver that had been appointed by the Kansas court, and to direct him to operate in harmony with himself; and upon consideration of the facts and circumstances the court came to the conclusion that the wise method of operation was to appoint the same man whom the Kansas court had appointed receiver of the Kansas property its receiver of the Missouri and Oklahoma property, ancillary to the receivership in this court. The Kansas property was delivered over, because the Kansas receiver, the receiver appointed by the Kansas court, had the primary right to take it, to enable that court to discharge its duty, leaving the reversion of the property and the control of it, subject to that temporary operation of the Kansas court, still within the jurisdiction of this court. This court, therefore, appointed the same man who was the receiver of the Kansas court the receiver of this court of the Oklahoma and Missouri property. I say the Kansas receiver because, although two receivers, I know, were appointed, one of them has deceased. It is more convenient to treat this matter as though there was only one receiver in Kansas then, as there is only one now.

Now, whenever it appears to the receiver of this court, or of any court, which has control or management of property of this character, that there is danger of its destruction or depreciation by the wrongful act of

any one, it is the duty of that receiver to apply to the court, whose hand he is, to protect that property from such destruction or interference. And pursuant to that duty this receiver, whose only power over the Oklahoma and Missouri property is derived from this court, has applied to this court by this dependent bill to exercise its power to prevent the depreciation of the property in his possession.

It is the opinion of the court that under these circumstances, however desirous the court might be to renounce or avoid the exercise of power or jurisdiction, it cannot lawfully do so, and that, if the allegations of this bill are true (a question that of course must be hereafter determined), this court has jurisdiction to exercise all the power that it had in the beginning over the property in Missouri and Oklahoma, and over the reversion of the property in Kansas, to prevent the depreciation of any of that property by the wrongful acts of anyone. \* \* \*

Of the contention of the Missouri defendants that the United States District Court for District of Kansas had no jurisdiction of them, Judge Sanborn expressed the judgment of the three judges in these words:

"The Missouri defendants claim that they are not within the jurisdiction of this court, because the process of this court was served on them within the state of Missouri, and not within the state of Kansas. The court is of the opinion that this is one of those cases referred to in Section 56 of the Judicial Code, that the original jurisdiction which this court

obtained by the filing of the original bills and the appointment of the receivers in the original suits still inheres in this court, subject, as has already been said, to the operation of the property in Kansas temporarily until that court shall have discharged its duty in the anti-trust case, and that the power which was invested in this court by the filing of those bills and the orders thereon, copies of which were filed in the federal courts in Oklahoma and Missouri, gave to this court the power to issue its process in any suit brought in aid of the original suits, for the purpose of the protection and administration of the property, to any of the jurisdictions which were ancillary to the original jurisdiction in those suits, and consequently to the defendants in the state of Missouri. This statute says:

'In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district.'

Missouri is within this circuit, and the court is of the opinion that the process was properly issued and served."

It may be noted in addition that the order surrendering the property to the Kansas court retained the potential possession in the United States District Court for the District of Kansas of the property. (Rec., p. 1003.) At the time the decrees here involved were entered the property in Kansas had been returned by the state court to the court below.

Requiring a public utility to operate property under unreasonable and non-compensatory rates is the taking of the property. This taking of the property in piecemeal is just as much an interference with the possession of this court, which has control of and the custody of the property, as though such property was seized by a sheriff on execution under the writ of another court. Anyone who unlawfully interferes with the administration of the property in the possession of a court or attempts to take property without the consent of that court, is subject to such court. Such court may also entertain a proceeding to prevent interference with the property under its control.

If the Public Service Commission of Missouri has required, or is requiring, the plaintiff to keep in force and effect unreasonable rates, or interferes with the plaintiff putting into effect reasonable and compensatory rates, then the United States District Court for the District of Kansas, by reason of its possession, has the right to entertain this bill as ancillary and dependent upon the suits pending in that court wherein the possession of the property of The Kansas Natural Gas Company is held. A federal court of equity has jurisdiction to hear and determine whether an order of a Public Service Commission is compensatory where the penalties for not obeying the order are unreasonable. This alone is sufficient to give the court jurisdiction, and it would give it jurisdiction, not only of the corporation commission, but of all of the officers whose duty it is under the law to enforce such penalties. (*Phoenix Railway Co. v. Geary et al.*, 36 Sup. Ct. Rep. 45, 239 U. S. 277.)

The plaintiff has alleged that the penalties prescribed by the act of the state of Missouri applicable to the situation here involved are unreasonable.

As the bill of complaint not only alleges a taking of the property in violation of the Fourteenth Amendment and an interference with interstate commerce conducted by the plaintiff, but also alleges that the action of the Public Service Commission of Missouri, the Attorney General of Missouri and the attorney of the Public Service Commission of Missouri, amounts to an interference with the property under the control of the court below, it has jurisdiction to determine whether or not the property in its possession is being interfered with and taken without its consent and permission.

Now, it is elementary that a proceeding to prevent an interference with the property in the possession of a court, either actual or potential, is not an original suit, but is in the nature of a dependent or ancillary bill, even though it is filed as an independent action.

In *Krippendorf v. Hyde*, 4 Sup. Ct. Rep. 27, 110 U. S. 276, suit was filed on the equity side to restrain the payment of money under an attachment on the law side. The suit in the law case was based on diversity of citizenship. The lower court dismissed the bill on the ground that it did not have jurisdiction, the plaintiff and defendant being residents of the same state. This Court reversed the lower court, saying that the bill was dependent upon and ancillary to the law case and

the court derived jurisdiction from the law case.  
This Court said:

"The bill in this case is not to be treated as an original bill in equity, for, as such, it could not be maintained. It is altogether ancillary to the principal action at law in which the attachment issued, and should be regarded as merely a petition in that cause, or dependent upon it and connected with it, as petition *pro interesse suo*, or of intervention in an equity or an admiralty suit, asserting a claim to property or a fund in court, the subject of the litigation, which, owing to the peculiar relations between the courts of the states and of the United States, is a necessary resort to prevent a failure of justice, and furnishes in such cases a certain adequate and complete remedy against injurious abuses of the process of the court, by supplying a means, in the principal suit, of trying the title to property in the custody of the law.

The character of the bill as related to the principal case is well explained in *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633, where it is stated 'that the question is not whether the proceeding is supplemental and ancillary or is independent and original in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original in the sense which this court has sanctioned, with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many

times that when a bill is filed in the Circuit Court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were a party to the judgment.'

\* \* \* \* \*

It is in this light, we think, that the court below should have regarded the present bill, not as an original bill invoking the general jurisdiction of the court of equity, but as an ancillary and dependent bill, equivalent in effect and purpose to a petition in the attachment proceeding itself, incident to and dependent upon it.

The form of proceeding, indeed, must be determined by the circumstances of the case. If the original cause, in which the process has issued, or the property or fund is held, is in equity, the intervention will be by petition *pro interesse suo*, or by a more formal, but dependent bill in equity, if necessary."

In *White v. Ewing*, 15 Sup. Ct. Rep. 1018, 159 U. S. 36, an ancillary suit was instituted by a receiver against various debtors of a corporation, many of whom were non-residents of the district within which the suit was brought. In most instances there was a lack of diversity of citizenship, and less than the jurisdictional amount was involved. All of the debtors were joined as defendants in one bill. Under this state of facts the Circuit Court of Appeals certified the following question to this Court for its determination:

"Had the Circuit Court of the United States in a general creditors' suit properly pending therein, for the collection, administration and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding \$2,000."

This Court determined that the Circuit Court did have jurisdiction, as the suit was ancillary and dependent upon the suit in which the receiver was appointed, and therefore the jurisdictional facts were to be determined by that suit.

See also Foster's Federal Practice, Vol. I, p. 146, 5th ed.; *Root v. Wookworth*, 14 Sup. Ct. Rep. 139, 150 U. S. 401, 413; *Brun v. Mann*, 151 Fed. (8th C. C. A.) 145; *Guardian Trust Company v. Kansas City Southern Railway Co.*, 146 Fed. 337, (8th C. C. A.); *Campbell v. Golden Circle Min. Co.*, 141 Fed. 610 (8th C. C. A.); *Ferguson v. Omaha, etc.*, 227 Fed. 513 (8th C. C. A.).

The other Missouri defendants are necessary in order to permit of a final determination of the case, and are therefore properly included. It therefore appears that the court below has jurisdiction of the Missouri defendants.

**As the United States District Court for the District of Kansas has jurisdiction of the Kansas defendants, there is no misjoinder of causes.**

The objections made by the Public Utilities Commission and the Attorney General of Kansas as to the joinder of the Missouri defendants are not tenable, for the reason that neither of them is injured thereby. (Story, Eq. Pl., Sec. 544; Foster's Federal Practice, 5th ed., Sec. 143, page 509, and cases cited.)

Not only is this suit ancillary to the suits pending in the United States District Court for the District of Kansas, in which it has retained potential possession of the property within the state of Kansas, but, in view of the constitutional questions involved, it has jurisdiction of the Kansas defendants on that ground also. The fact that the order of the Public Utilities Commission is alleged to be confiscatory and the penalties provided for failure to obey the same are unreasonable, gives the court jurisdiction aside from the questions of taking the property without compensation and the interference with interstate commerce alleged by the plaintiff.

Potential possession has been referred to in *Boatmen's Bank v. Fritzen*, 135 Fed., p. 666, (8 C. C. A.) where it was said:

"Moreover, even if the state court had acquired and yet retained *potential* jurisdiction of the personal property in the Weldon suit, it had not taken or sought to take, and it had

not acquired, the actual custody and possession of it."

See also *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772, p. 780, for use of the word "potential."

That the pipe line system is one entire unit which cannot be operated separately and must be treated as a whole, has been determined by the Eighth Circuit Court of Appeals in *Kansas City Pipe Line Company v. Fidelity Title & Trust Company*, 217 Fed. 187, p. 195. The cities and distributing companies of Kansas and Missouri are necessarily made parties in order to reach a final determination in this suit. The cities are attempting to interfere with the possession of this Court of the property in the hands of plaintiff as an officer of the court. But aside from that, as the property is one unit, interference or injury to the property by various persons may be enjoined in one suit. (*Arthur v. Oakes*, 63 Fed. 310; *Foster's Fed. Prac.* (5th Ed.), Sec. 141, pp. 506, 495.)

The case also comes clearly within Equity Rule 26, which provides for the uniting of causes of action where it appears that such joinder will promote the convenient administration of justice.

Equity rule 26 reads as follows:

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material de-

*fendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."*

It is the contention of the Kansas Public Utilities Commission that it can fix the rate in Kansas and the Missouri Public Service Commission can fix the rate across the line. Thus we have this public utility subjected to the control of two masters, each striving to get the greatest possible service at a price a little lower than the other, and therefore at the other's ultimate expense.

The Public Service Commission of Missouri has announced and decided that it will not permit any higher rate to be charged in the cities in Missouri than in the border cities of Kansas. This condition is intolerable. The situation demands and admits only of a uniform system or plan of control. The property cannot be dealt with except as a unit. Hence this case falls clearly within Equity Rule 26, and the whole matter should be determined in one plenary suit.

**The question of the control of the Kansas Public Utilities Commission over the interstate commerce conducted by plaintiff is not *res adjudicata*.**

The principal question in this case is interstate commerce. If the commerce conducted by plaintiff receiver is interstate from point of origin to the consumers' burners and national in character, the decree below must be affirmed. We feel the concise and able exposition on the subject of interstate commerce presented by Judge Booth in his opinion in this case (Rec., pp. 588-599) is all persuasive and conclusive. We, however, beg the court's indulgence, in referring to and quoting from some of the cases cited by him and pointing out their peculiar applicability to the facts in this suit.

The character of the commerce conducted by the plaintiff receiver in the transportation of natural gas through the system of pipe lines here involved has been before this Court twice, the Circuit Court of Appeals, Eighth Circuit, once, the Supreme Court of Kansas twice, and the United States District Court for the District of Kansas three times. The Supreme Court of Kansas in its dicta has disagreed with the decisions of the federal courts.

At the outset we are confronted with the contention that the question of interstate commerce, so far as this receiver is concerned, is *res adjudicata*. The contention of the defendants and the answers thereto are so well stated by Judge Booth

in his opinion in the court below that we take the liberty to quote his language (242 Fed. 679; Rec., p. 588):

"It is further claimed on the part of the commission that the question in interstate commerce is *res adjudicata*, having been passed upon by the Supreme Court of the State of Kansas in the case of the *State ex rel v. Flannelly*, 96 Kan. 372.

This contention on the part of the defendant that the question of interstate commerce is *res adjudicata* was presented to the enlarged court, and argued at length, upon the application for a preliminary injunction. That court in its opinion took occasion to discuss the matter, and reached the conclusion that the question was not *res adjudicata*. It is not necessary to repeat what was then said, but it will be sufficient simply to make reference thereto. See 234 Fed. 152.

It is earnestly contended, however, by counsel for the commission, that sufficient consideration was not given by the court to the fact that State Supreme Court of Kansas upon the first hearing in the mandamus matter, No. 21324, though denying the writ, nevertheless retained jurisdiction. The position of counsel for the commission seems to be that the retention of jurisdiction by the State Supreme Court involved necessarily a finding on the question of interstate commerce, and rendered that question *res adjudicata*.

There are at least two answers to this contention. First, the retention of jurisdiction by the State Supreme Court in the mandamus matter was not necessarily based upon such a finding as is now claimed, for there was in the mandamus proceeding another independent

matter which did not necessarily involve the question of interstate commerce, namely, the character of the service which the receiver should be compelled to furnish. The mandamus petition contained a distinct prayer for relief in regard to this latter matter. On the first hearing the court could grant no relief in respect to this matter for the same reason that it could grant no relief in regard to the rate matter, namely, that there was before it no order made by the commission. That the Supreme Court retained jurisdiction in the mandamus proceeding, partly at least on account of this matter of service is apparent from the opinion of the court rendered on the second hearing. At this time also it appeared that the commission had made no order in regard to the character of the service. The Supreme Court said:

'Since it is now conceded that the Public Utilities Commission has made no order requiring the defendants to furnish better or more efficient service the court would not be justified in granting the writ nor in longer retaining the proceeding.'

Second, there was in the mandamus proceeding no 'final judgment' entered of such a character as would render any question in the proceedings *res adjudicata*, or which could be carried by the receiver to the Supreme Court for review. See

*Louisiana Nav. Co. v. Oyster Commission*,  
226 U. S. 99.

*McLish v. Roff*, 141 U. S. 661.

Furthermore the Fidelity Title and Trust Company, trustee under the mortgage made by The Kansas Natural Gas Company, was not a party to the mandamus proceedings, and

was not bound by the judgment entered therein; and it might in subsequent litigation to which it was a party, raise any of the questions involved in the mandamus proceedings. See

*Keokuk Western R. R. v. Missouri*, 152 U. S. 301.

*Old Colony Trust Co. v. Omaha*, 230 U. S. 100.

*Louisville Trust Co. v. Cincinnati*, 76 Fed. 296.

*Williamson v. City of Clay Center*, 237 Fed. 329.

The Trust Company is a party to the present suit, and has at all stages insisted that the business carried on by the receiver is interstate commerce, and not subject to the regulation or control of the Public Utilities Commission of Kansas."

The opinion of the Supreme Court of Kansas, reported in 96 Kan. 372, was delivered on October 4, 1915. In the later decision (96 Kan. 833) in the same case the Supreme Court of Kansas dismissed the suit. The order of the Public Utilities Commission attacked in the court below was dated December 10, 1915, and was not made until after the decision in *State ex rel. v. Flannelly*, 96 Kan. 372. Hence the question of the order of December 10, 1915, is not *res adjudicata*. *State ex rel. v. Leavenworth*, 75 Kan. 787, 790; *Shepherd v. Kansas City*, 81 Kan. 369; *Railway Company v. Cherryvale*, 87 Kan. 57, 62.

The Supreme Court in *State ex rel. v. Flannelly*

nely, 96 Kan. 833, recognizes that the order of December 10, 1915, presented a new cause of action and that its decision as to the former order did not control. In this case, which also relates to the order of December 10, 1915, the opinion of October 4, 1915, would not control.

It is the judgment of the court which controls the question of *res adjudicata* and not the reasons assigned for the judgment. In *Bank v. Brigham*, 61 Kan. 727, p. 731, the Supreme Court of Kansas has stated the doctrine in these words:

"The conclusiveness of a judgment of a court does not exist in the reasons for it, but exists in the judgment itself. The estoppel resides in the judgment and not in the explanatory reasons for rendering it. It not infrequently happens that the decision of an appellate tribunal affirming the judgment of an inferior court is based upon different grounds than those upon which the lower tribunal rested its decision. In such cases the mere opinion of the reviewing court is not *res adjudicata*. It is argumentative only."

The above decision was followed in *State v. Hornaday*, 62 Kan. 334, 337, where it was said:

"In the case of *Hornaday v. The State* (a former decision), the District Court had enjoined the board of trustees from accepting conveyances and making payment for a site which had been bargained for by the legislative committee. Its judgment was affirmed by this court. In the opinion of this court one of the reasons for affirming the judgment of the District Court was that the board of

trustees itself, and not the legislative committee, was authorized to purchase or condemn and make payment for the selected site. Now, this expressed view of the law did not constitute the judgment of this court nor of the District Court, it only constituted a reason for the judgment. As such it is not an estoppel.

\* \* \* \* \*

Estoppels, therefore, where they exist, must be found in the declared and recorded judgments of the courts and not in their argumentative reasoning."

The judgment of October 4, 1915, was that the writ of mandamus be refused. As we have seen, the judgment controls, not the opinion of the court assigning reasons for it. As the judgment did not authorize the Public Utilities Commission of Kansas to exercise any authority over the plaintiff, the question of interstate commerce did not become *res adjudicata*. The Public Utilities Commission of Kansas cannot claim that its assumption of authority over plaintiff as to interstate commerce was affirmed by the order of the Supreme Court of Kansas which refused to compel the plaintiff to obey such order.

In *Railway Company v. Cherryvale*, 87 Kan. 57, p. 62, the Supreme Court of Kansas announced a similar conclusion:

"The further contention that the decision in the former case is a final adjudication of the right to impose the tax can not be sustained. The refusal to enjoin the improvement of this traveled way because no injury

was shown is not an adjudication that the place so improved is a public street."

So in this instance a refusal by the Supreme Court to grant a writ of mandamus compelling the plaintiff herein to obey an order of the Public Utilities Commission is not an adjudication that the Public Utilities Commission has authority to make such an order. It is the judgment which controls, not the reasons assigned for it. Under the decisions of the Supreme Court of Kansas its judgment of October 4, 1915, is not *res adjudicata*.

Whatever may be the position of the plaintiff in this case the judgment of October 4, 1915, is not controlling upon the defendants, Kansas Natural Gas Company and the Fidelity Title & Trust Company, and George F. Sharitt, the receiver originally appointed by the Federal Court, all of whom have filed cross bills praying for the same relief sought by the plaintiff. These parties are entitled to have this question determined, and as they were not parties to the suit in the Supreme Court of Kansas they are not bound by that decision. The privity of the mortgagee with the mortgagor respects only the estate as it existed at the date of the mortgage. It cannot be affected by a decree against the mortgagor to which he is not a party. (*Secor v. Singleton*, 41 Fed. 725; *Louisville Trust Company v. Cincinnati*, 76 Fed. 293, 296, 22 C. C. A. 234; *Laighton v. City of Carthage*, 175 Fed. 145, p. 150.)

The dictum in the opinion of the Supreme Court of Kansas may be persuasive, but it is not controlling. This court will follow its own determination of the questions as set forth in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564.

**The sale to Kansas and Missouri consumers of natural gas produced in Oklahoma is interstate commerce, as is also the sale to consumers in Missouri of natural gas produced in Kansas.**

We shall first review the contentions of those Kansas defendants who deny that the plaintiff receiver is engaged in interstate commerce. Counsel for the Public Utilities Commission state their contention in these words, 242 Fed. 679 (Rec., p. 588):

"Our position is, however, that the receiver being a public utility under the laws of Kansas, and actually engaged in a domestic and local business within the state, and employing local franchise in the local sale and distribution of gas, thereby commingling its property with the general property of the state, is unquestionably engaged in intrastate commerce, and has unquestionably taken away from the transaction of importing gas into the state and the sale of the same to customers, all of the interstate features which might have existed had the company not employed local agencies for the sale of gas in said state."

It is admitted by all that the transportation of natural gas by the receiver from Oklahoma into Kansas and thence into Missouri and from Kansas into Missouri is interstate commerce, but it is insisted that at some point before the gas reaches the ultimate consumer the transaction has ceased to be interstate commerce. There is a divergence

of view between the Supreme Court of the State of Kansas and counsel for the Public Utilities Commission of the State of Kansas as to the point at which the interstate commerce transaction loses its character as such. 242 Fed. 682. (Rec., p. 591.) The Supreme Court of Kansas, in *State v. Landon*, adopted the "original package" idea. (96 Kan. 372.) It said:

"The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce."

And again:

"Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale."

The Supreme Court of Kansas also says that even though the business conducted by the plaintiff receiver be interstate commerce, yet it is of such a local character as to be subject to state control, in the absence of regulation by Congress. In the later case of *State ex rel. v. Gas Company*, 100 Kan. 593, l. c. 597 (decided subsequent to the first opinion rendered by Judge Booth in this cause), the Supreme Court of Kansas stresses that part of its former dictum asserting that the interstate business conducted by the plaintiff receiver is of a local character and subject to the control of state authorities until Congress has acted upon the subject.

On the other hand, counsel for the Public Utilities Commission of Kansas claim the transaction loses the character of interstate commerce when the gas passes from the pipe line of the receiver to the lines of the local distributing companies. Counsel for the Commission do not premise their contention upon the fact that 6 per cent of the gas distributed in Kansas originates in the same state. They take the broad position that if all of the gas distributed by the Kansas Natural Gas Company and its agents was obtained in other states than Kansas, still the service is of a local character and subject to local regulation. In their former brief in the court below they say (Rec., p. 591) :

"There is no original package where the transportation is conducted by means of a pipe line. Gas so conducted is not susceptible of delivery in original package." \* \* \*

"We say simply that the character of this service cannot be destroyed or explained away by the fact that any amount, or, indeed, all the amount, of the gas distributed locally by The Kansas Natural Gas Company and its agents was obtained in other states than Kansas. Such service is still a local service not interstate in its character and is subject to local regulations."

The contentions of the Kansas defendants, summarized, are:

1. All defendants admit that the transportation of natural gas from Oklahoma into Kansas and from Kansas into Missouri is interstate commerce.

But such transportation loses its interstate character—

(a) When the original package of gas is broken by drawing off of the first gas for local distribution in Kansas;

(b) By the delivery of the gas to the distributing companies for local distribution;

(c) By the storage of gas in the main trunk lines until it is drawn off for local distribution.

2. Although the business conducted by the plaintiff receiver is interstate commerce, yet it is subject to local regulation because—

(a) The agents of the plaintiff receiver employ local franchises and franchise rights in the distribution of the gas in the cities;

(b) The transportation of natural gas is interstate commerce of a local character, and, until Congress has acted in the premises, is subject to control by the state authorities.

We shall discuss these contentions in inverse order, but at the outset let us direct the Court's attention to a basic fallacy which underlies all of defendants' contentions.

**The protection of the interstate commerce clause extends not only to the transportation of the article, but also to the sale of the article when it arrives at its destination.**

We believe all the contentions by defendants are fundamentally wrong. Their misconceptions are premised on their failure to recognize the fact that the interstate commerce clause of the Federal Constitution protects not only the transportation of the articles in interstate commerce, but its sale after the completion of its journey. The Supreme Court of Kansas has attempted to say in its dicta that when the gas is sold it loses the protection of the interstate commerce clause. Attorneys for the Public Utilities Commission of Kansas assert that by reason of the rendition of a local service by the distributing companies prior to the final sale of the gas interstate commerce ceases. Both of these arguments ignore the extent of the interstate commerce transaction. It is not the transportation alone which is protected, but the sale and delivery of the article as well. If this was not the case, then the right to engage in interstate commerce would be but a mockery and each state could throttle the commerce from any other state by regulating the price at which the article should be sold within its borders. *Heyman v. Hays*, 236 U. S. 178, 35 S. Ct. 403. These contentions of defendants likewise overlook the elements which make up the price charged to the consumers of natural gas.

The price charged for natural gas to consumers

at any point includes the cost to produce or purchase the natural gas, plus the cost of transportation from the place of production to the place of consumption, and profits, if any. The Public Utilities Commission of Kansas recognizes this in its opinion, for it approves a different rate for natural gas dependent upon distance of transportation.

That the receiver owns the gas transported makes it none the less interstate commerce, was decided in the *Oil Pipe Line Cases*, 234 U. S. 548, 58 L. Ed. 1459, 34 S. Ct. 956.

That the price at which natural gas is sold includes the original cost, cost of transportation and profit, if any, makes it no less commerce, either interstate or intrastate, dependent upon where the transportation begins and where it ends.

The protection of interstate commerce extends not only to the transportation of the article, but to the sale of the article when it arrives at its destination and completes its interstate journey. The earliest enunciation of this doctrine is in the case of *Brown v. Maryland*, 12 Wheaton 419, in which Chief Justice Marshall said:

"To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported. Sale is the object of importation, as indispensable to the existence of the entire thing, as importation itself. It must be considered as a competent part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. \* \* \*

If the principles we have stated be correct,

the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer, for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the article into and with the mass of property in the country must be hostile to the power given to congress to regulate commerce, since an essential part of that regulation and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation."

See also to the same effect, *American Express Company v. Iowa*, 196 U. S. 133.

*Minnesota v. Barber*, 136 U. S. 313.

In the case of *Shollenberger v. Pennsylvania*, 171 U. S. 1, 24, the court states that this right to sell in the original package exists *even though the original package is suitable for sale to the retail trade*, that is the ultimate consumer.

Congress in the Wilson Act removed this right of first sale or of sale in the original package as to intoxicating liquors. Otherwise, it remains unaffected.

Because the courts for convenience have stated the rule in terms of "the original package" it will not escape the court's attention that the original package feature of it is not the rule, but is simply a convenient means of applying the rule. An examination of the cases discloses that the courts have recognized that the power of sale is an inseparable attribute of the enjoyment of the rights

of ownership; that it would be a mere trifling with words to give freedom to interstate commerce without also giving the power of disposal. The rule actually is that freedom of interstate commerce extends during its transportation and until the article is sold. In other words, it extends to the first sale after the transportation is ended. Natural gas does not come in packages. Hence, there is no place for the short name for the rule found by the courts in other cases to be convenient. The rule, of course, extends as much to a commodity not capable of confinement in a package as to an article that is, and the importer of natural gas has a right to enjoy the freedom given to him by the Constitution just as much as the importer of intoxicating liquor; that is, he has the right to sell it without regulation and without interference by state authorities. The receiver sells this gas but once, and whether it be to the distributing companies or through the distributing companies is immaterial. The right to sell an imported product is guaranteed by the Constitution just as well as the right to import it.

From these decisions it follows the position of the defendants is erroneous and the interstate character of the business conducted by plaintiff is not destroyed by the numerous sales to consumers.

**The transportation and sale of natural gas in interstate commerce is national in character.**

That the regulation of the interstate transportation of natural gas is not local in its character is disclosed by the history of The Kansas Natural Gas Company. In 1907 Oklahoma passed a law prohibiting the construction of pipe lines for the transportation of natural gas except by a domestic corporation whose charter should provide that the gas should not be transported outside the state. The constitutionality of that Act was passed upon by the Circuit Court of Appeals, 8th Circuit, in *Haskell v. Cowham*, 187 Fed. 403. Cowham owned gas wells in Oklahoma and desired to transport the natural gas from such wells into the state of Kansas for sale in that state. Circuit Judge Sanborn, in delivering the opinion of the court, announced the doctrine:

"Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject national in its character and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that interstate commerce therein shall be free, and any law or Act of a state or of its officers which prohibits it or substantially restrains its freedom is violative of the Constitution and void."

Circuit Judge Sanborn, in conjunction with District Judges Booth and Campbell, reiterated the

same view in regard to the interference by the state of Kansas with the business conducted by the plaintiff receiver, upon the application for preliminary injunction in this cause. 234 Fed., l. c. 164. The case of *Haskell v. Corzham*, *supra*, was approved and followed by this Court in *West v. Kansas Natural Gas Company*, 221 U. S. 229, 31 S. Ct. 564, which involved the same system of pipe lines as here concerned.

The statute of Oklahoma of 1907 forbidding the transportation of natural gas in interstate commerce was held by this Court to be unconstitutional. In the *West* case this Court dealt with the same gathering lines and the same trunk lines that are here concerned. The same question of the right of local regulation of interstate commerce was presented there as is urged here, and this Court said:

"But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar. *State ex rel. Corwin v. Indiana & O. Oil Gas & Min. Co.*, 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; *Benedict v. Columbus Constr. Co.*, 49 N. J. Eq. 23, 23 Atl. 485, and also in *Haskell v. Corzham* (April 7, 1911), United States Circuit Court of Appeals, Eighth Circuit."

Continuing, this Court referred to the case of *Haskell v. Cochran*, 187 Fed. 403, in these words:

"As said by the Circuit Court of Appeals in the Eighth Circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends."

Thus has this Court already determined that natural gas is as much a commodity as iron, ore, coal or petroleum and can be transported in interstate commerce as can those products. This court has in unmistakable terms announced that the inaction of Congress is a declaration of freedom from state interference with the transportation of natural gas in interstate commerce. (See also *Haskell v. Kansas Natural Gas Company*, 224 U. S. 217, 32 S. Ct. 442.)

Further evidence of the national character of the transportation of natural gas in interstate commerce is furnished by the litigation in this case. Judge Booth in his opinion in this case, after quoting from the decisions of this Court in *South Covington Ry. Co. v. Covington*, 235 U. S. 537, 35 S. Ct. 158, and the decision in *Haskell v. Cochran*, *supra*, summarizes the situation in these words (242 Fed. 687-9):

"If anything further than the foregoing statement as to the character of the business actually carried on, and the application thereto of above cited authorities, were necessary in order to establish that the business carried on

by the receiver is interstate in its character, and of such a nature as not to be properly susceptible of or subject to local state regulations such as the 28 cent rate order, we have the statement of the Public Utilities Commission itself in its opinion of July, 1915, which opinion concluded with the following language:

'It developed upon the hearing that more than half the natural gas supplied and marketed by complainants is sold in the State of Missouri. It is conveyed by means of pipe lines passing through Kansas City, St. Joseph and other cities in our sister state. It would be manifestly unfair to permit complainants to advance the price of gas to their Kansas patrons unless a corresponding increase were made to consumers in Missouri. It is conceded that an advance in Kansas without a similar one in Missouri would be unavailing for the purposes contemplated by complainants, and they do not desire any advance in Kansas except as it may be simultaneous with a corresponding one in Missouri.'

'This Commission, therefore, awaits the pleasure and action of the rate-regulating body or bodies of Missouri having jurisdiction of the subject matter; and if in that State proper and necessary orders be issued establishing a schedule of rates as herein outlined, an order, effective, if possible, simultaneously, will be issued by this Commission in accordance with the views herein expressed.'

The same conclusion was apparently reached by the Supreme Court of the State of Kansas, in *ex rel Flannelly* 96 Kansas, 372, when in its opinion the court said:

'The last question for our consideration concerns the legality of the rates, both those that

are in existence at the present time and those named in the opinion of the Commission. The Commission finds that where the net price of gas to consumers is now 25 cents per thousand cubic feet, the rate should be increased to 28 cents. This, in effect, is a finding that the rates now in existence are not compensatory. It then became the duty of the Commission to fix compensatory rates, taking into consideration the gas sold in Missouri, assuming that compensatory rates will be fixed in Missouri. However, we may say that obedience to law in making rates in Kansas cannot legally be made dependent on obedience to the same law in Missouri.'

The State of Kansas itself has thus realized that the business carried on by the receiver is of such character that the fixing of rates thereon is not a merely local matter:

Furthermore, control over the supply of gas is not within the power of the Commission. The supply is an important element, however, in the fixing of rates. This state of affairs militates strongly against a conclusion that the business is of such character as to be properly subject to state control in the matter of rates.

The case of *Manufacturers Heat & Light Company v. Ott*, 215 Fed. 940, relied upon by the defendant Commission, must be disregarded if it conflicts with the decisions above cited, for these decisions are binding upon this Court. It may, however, in my opinion, be distinguished by the fact that the great bulk of the business transactions considered in that case were concededly intrastate, and the portion claimed to be interstate of very minor importance; whereas in the instant case exactly the reverse of those facts is true.

It is true that about six per cent of the gas delivered by the receiver in Kansas is produced in Kansas, but this cannot alter the general situation.

Where a substantial part of a business is interstate commerce, the imposition of burdens and regulations thereon by state action cannot be justified by the fact that a portion of the business thus sought to be controlled and regulated is intrastate.

See *LeLoup v. Port of Mobile*, 127 U. S. 640, 647.

*Norfolk Ry. v. Penn.*, 136 U. S. 114-119.

*Crutcher v. Ky.*, 141 U. S. 47, 59.

*Galveston Ry. v. Texas*, 210 U. S. 217, 228.

*W. U. Co. v. Kansas*, 216 U. S. 1.

*Williams v. Talladega*, 226 U. S. 404, 419."

In the case of *South Covington Ry. Co. v. Covington*, 235 U. S. 537, 35 S. Ct. 158, this Court in passing upon a municipal ordinance governing and regulating street cars running between that city and Cincinnati, Ohio, said with reference to one of the sections making it unlawful for the company to permit to ride in its cars more than one-third of the number of passengers over and above the number for which seats were provided therein, stated as follows:

"If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced and on the other side quite a different set, and both seeking to control a prac-

tically continuous movement of cars. As was said in *Hall v. DeCuir*, 95 U. S. 485, 489, 'commerce cannot flourish in the midst of such embarrassments.' "

"We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

So here, as Judge Booth has pointed out, if Kansas can regulate the business conducted by plaintiff receiver, then Missouri can do the same thing, and by conflicting rates and regulations the interstate business of the receiver will be destroyed. In fact, except for the protection granted by the court below, the interstate business conducted by the receiver would now be at an end owing to the burdens imposed by the state commissions.

It has been acknowledged that the transportation of natural gas by pipe lines is the only practical method of handling that article. *Haskell v. Cowham*, 187 Fed. 403. This Court has recognized the same condition prevails as to the transportation of oil by pipe line. *Pipe Line Cases*, 234 U. S. 548, 58 L. Ed. 1459.

The system of pipe lines operated by plaintiff receiver supplies 45 cities and towns, extends a distance of approximately 400 miles from the wells in Oklahoma to St. Joseph, Missouri, and in addition has many miles of lateral lines. But this

system, as the bulletins and reports of the Bureau of Mines, Department of the Interior, show, is but one of many systems in the United States transporting natural gas in interstate commerce. The fields of West Virginia supply many of the principal cities of Ohio and Western Pennsylvania; likewise the cities of Louisville, Kentucky, and Baltimore, Maryland. The fields of Oklahoma supply many cities not only in Oklahoma, but in south central Kansas. Texas and Louisiana also have their pipe line systems. From the fields of Illinois and Indiana for many years natural gas has been transported in interstate commerce. The present mileage of pipe lines transporting natural gas in interstate commerce compares quite favorably in extent with the mileage of railroads in the United States at the time of the decision of this Court in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, when it was held that the inaction of Congress was a declaration that states should not and could not determine rates for the transportation of goods by railroads in interstate commerce. The magnitude of the systems transporting natural gas indubitably negatives the contention that the interstate commerce conducted is of a local character and subject to local regulation. As this Court decided in *West v. Kansas Natural Gas Company*, *supra*, the inaction of Congress is a declaration of its intention that the field should be free from interference by the state.

**The use of franchise rights and local agencies in the distribution and sale of natural gas does not subject the interstate commerce conducted by the plaintiff receiver to state control.**

It is contended by defendants that the interstate character of the business transacted by the plaintiff receiver is lost by employing local franchises in the local sale and distribution of gas. This contention is not new; it was urged upon this court in *West v. Kansas Natural Gas Company, supra*. The State of Oklahoma insisted that, since it had the right to refuse to grant the power of eminent domain to a gas corporation, it could in that manner interfere with interstate commerce. This Court denied the right of the State of Oklahoma to regulate the transportation of natural gas in interstate commerce through the refusal to grant franchises. The same contention was presented to this Court in *Western Union Telegraph Company v. Foster*, — U. S. —, 38 S. Ct. 438, known as the Ticker Cases. It was there urged that, since the state granted to the telegraph companies the use of the streets under franchises, the state had the power to control the business of the telegraph company. In answering that contention, this Court said: (P. 439.)

"It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow.

Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U. S. 324, 357, 33 Sup. Ct. 90, 57 L. Ed. 243, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 35 Sup. Ct. 57, 59 L. Ed. 193."

It follows that the position of defendants in this respect is untenable. The granting or withholding of franchises cannot be used by the states as a means of unduly burdening interstate commerce.

The employment of local agencies in the nature of distributing companies does not change the character of the commerce conducted by the plaintiff receiver. With one or two exceptions, the distributing companies do no business except to transport and distribute the natural gas transported in interstate commerce by the plaintiff receiver. Employment of local agencies in itself would not authorize the state to regulate the interstate commerce conducted by the plaintiff receiver.

Local incidental service at the initial point of the journey does not prevent the interstate character from attaching to the shipment; nor does a similar incidental local service at the end of the journey destroy that character.

*So, Pac. Term. Co. v. I. C. C.*, 219 U. S. 498.

*United States v. Ill. Cent.*, 230 F. 940.

*Penn. R. Co. v. Clark Co.*, 238 U. S. 456, 465-8.

*So. Ry. v. Prescott*, 240 U. S. 632.

*Penn. Ry. Co. v. Sonman*, 242 U. S. 120.

*Grand Union Tea Co. v. Evans*, 216 F. 791.

*City Lee Summit v. Jewel Co.*, 217 Fed. 965.

Even did the distributing companies also do an intrastate business, it would not give to the state authority to regulate the interstate business. The Supreme Court of Kansas, in *State ex rel. v. Flannelly*, 96 Kan. 372, and *State ex rel. v. Litchfield et al.*, 97 Kan. 592, took the position that the distributing companies were but the agents of the receiver of The Kansas Natural Gas Company.

If the distributing companies are to be considered agents of the receiver of The Kansas Natural Gas Company, then this case comes within *Crenshaw v. Arkansas*, 227 U. S. 389; *Singer Sewing Machine Company v. Brickell*, 233 U. S. 304, 58 L. Ed. 974, 34 S. Ct. 493; *Davis v. Virginia*, 236 U. S. 697, 35 Sup. Ct. Rep. 479; and *Stewart v. Michigan*, 232 U. S. 665, 58 L. Ed. 786, 34 S. Ct. 476, for the order for the natural gas is given by the consumer to the distributing company long before the gas is started in the course of transportation. When the consumer connects with the distributing company's system, he thereby asks for a supply of natural gas to be furnished him at all times in the future. It is with the knowledge of the demands of these consumers and for the purpose of supplying them, that the receiver starts his natural gas in the course of transportation from Oklahoma to Kansas.

The State of Michigan, in the case of *Stewart v. Michigan, supra*, 232 U. S. 665, 58 L. Ed. 786, 34 S. Ct. 476, attempted to impose a tax upon a salesman, under the following circumstances: Stewart solicited orders in Michigan for groceries and other merchandise, to be shipped from his Chicago store. Duplicates of the orders were sent to his manager at Chicago and goods corresponding to the orders were shipped in carload lots from Chicago, consigned to Stewart at points in Michigan. Upon arrival of the cars in Michigan the goods were delivered to customers by draymen employed by Stewart, who filled the orders from the cars by checking from the original orders, there being no identifying marks on the packages except as to their contents. There was some evidence to show that some orders were sold by Stewart from the car without previous solicitation. The trial court instructed the jury that because of the fact that the goods had no identifying marks on them, and because the goods were consigned to Stewart, the sales were not consummated until delivery was made to the merchants. This court decided that the rule announced in *Crenshaw v. Arkansas, supra*, applied and that Stewart was not subject to any license tax, because he was engaged in interstate commerce. The sales of natural gas by the plaintiff receiver are no more indiscriminate than the sales by Stewart. The same rule should apply to both.

If, however, the distributing companies are considered independent but in the nature of connecting carriers, the same result is reached. The

relationship of the distributing companies, we do not deem important. It is the *purpose* and *intent* with which the transportation is commenced and the *manner* in which the transportation is conducted, which controls.

**The use of the distributing companies' systems in the distribution and sale of natural gas does not change the interstate character of the commerce conducted by plaintiff receiver to intrastate.**

What is the manner in which the plaintiff receiver conducts interstate commerce in natural gas? The following statement of the interstate transactions of the plaintiff receiver is taken from the opinion by Judge Booth, 242 Fed., l. c. 681, in the court below, who in turn quotes from the Supreme Court of the State of Kansas:

"In determining the question whether the transactions carried on by the receiver constitute interstate commerce, it will be helpful to have clearly in mind just what those transactions are. The Supreme Court of the State of Kansas in *State ex rel. Flannelly, supra*, has stated the matter as follows:

'The gas sold by the receivers is produced in both Kansas and Oklahoma. It is transported from the wells through pipe lines beginning in Oklahoma, entering the State of Kansas near Coffeyville, at which place gas is first distributed and sold to consumers. The remainder is transported north through pipe lines into which gas from wells in Kansas is conveyed, and the gas from Oklahoma and Kansas is then transported through the same pipe lines and through compressing stations to Independence and north and east throughout this state, and after supplying the consumers in this state, it is transported into the state of Missouri, where it is sold to other consumers. After the gas from this state is

discharged into the pipe lines with the gas from Oklahoma, it is impossible to distinguish one from the other or to separate one from the other. About 85 per cent of the gas sold is produced in Oklahoma, and 15 per cent is produced in Kansas. About 60 per cent of the gas sold is sold in Missouri and 40 per cent is sold in Kansas. The gas sold in Kansas is delivered to the consumers thereof, in the several cities by distributing companies operating under franchises obtained by the distributing companies from the cities, fixing the rates charged customers for gas. These distributing companies act as agents for The Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the receivers on a percentage basis. The gas is not sold by the receivers to the distributing companies. It is delivered from the pipe lines of The Kansas Natural Gas Company, under the control of the receiver, into the pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of The Kansas Natural Gas Company to the consumers. The gas is consumed as fast as it is sold, and is consumed immediately after passing through the meter measuring the gas to consumers."

And again in the course of his opinion, 242 Fed. 684, Judge Booth summarizes the business transacted by the receiver in this manner:

"Reverting to the character of the business transacted by the receiver, it is to be noted.

(a) That the shipment is started on its journey from one state to another, (b) with the purpose that it shall be delivered to a con-

sumer, (c) that it moves continuously from a point of shipment in one state to the consumer in another state, (d) that it is moved part of the way in the pipe lines of the receiver and part of the way in the pipe lines of the distributing company; whether as agent of the receiver or as connecting carrier is immaterial. (e) The destination of the shipment is intended at the time of the shipment to be beyond the state, although the name of the particular consumer for any specific portion of the gas shipped is not known. (f) There is no stoppage in transportation. (g) The title to the gas remains in the receiver until delivery to the ultimate consumer.

In substance and effect there are continuing orders by the consumers to the receiver through the distributing company to supply them with gas from the Oklahoma fields. Such transactions have the character of interstate commerce at their inception, and this character continues until final delivery.

*Crenshaw v. Arkansas*, 227 U. S. 389 and cases cited.

Even though the shipment is started before a definite order for a specific amount is given, still, the continuous and usual course of business determines the character of the shipment.

*Swift & Co. v. United States*, 196 U. S. 375.

*Grand Union Tea Company v. Evans*, 216 Fed. 791.

Applying the foregoing principles to the facts in the case at bar, the conclusion follows that the transportation of gas carried on by the receiver is interstate commerce, and that the character of the business inheres from the

beginning of the journey in Oklahoma to the termination thereof at the burner tips in Kansas or Missouri."

As the court below found, the transportation of the gas does not cease until the gas is consumed. The contention that the gas is at rest, that the whole pipe line system constitutes one huge reservoir from which the gas is taken off as needed by the consumers, is not supported by the evidence and is contrary to the finding of the court below.

As is shown by the affidavits of John M. Landon, V. A. Hays, and Samuel S. Wyer, (Rec. pp. 1700, 1701, 1145, 1155), the natural gas is in the course of continuous transportation from the moment it leaves the wells in Oklahoma or Kansas until it is consumed in Kansas or Missouri.

There is no such thing as a reservoir or storage tank in which the natural gas comes to rest and is drawn off as required. The truth of the matter is that the greater part of the year the receiver is not able to furnish the natural gas rapidly enough to meet the demand. It would require a reservoir capable of holding millions and millions of cubic feet to store natural gas sufficient to meet the needs of consumers for even a few hours. The compressors are merely rapidly moving pistons, which, instead of stopping the flow of the natural gas for a moment, increase the speed with which the natural gas travels through the pipe lines to a rate greater than that of an express train. (See Exhibits R and S, pp. Rec. 1142, affidavit of Samuel S. Wyer, and pp. 1125 and 1137, same affidavit.)

In order to bring the transportation within the protection of the interstate commerce clause, it need not be conducted by one carrier alone. Plurality of carriers does not affect the question.

The authority for the above is found in the case of *South Covington & C. Street R. Co. v. Covington*, 235 U. S. 537, 35 Sup. Ct. 158:

"This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states; the mere arrangements of billing or plurality of carriers do not enter into the conclusion."

It is the purpose and intent with which a shipment is commenced that determines whether the commerce is interstate throughout or interstate to a given point and then intrastate from that point forward. There may be a change of ownership in transit without affecting the character of the shipment. (*Gulf, Colorado & Santa Fe R. Co. v. Texas*, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. Rep. 360.)

The case of *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. Rep. 259, 47 L. Ed. 361, shows that the purpose which is formed at the commencement of this shipment and carried out in the transportation determines the question of whether or not it is interstate commerce. In that case sheep were being driven from Utah through Wyoming to Nebraska. While so traveling they were allowed to graze over the land. They were assessed in the County of Laramie, Wyoming, for taxation. In regard to this matter the court said:

"The question turns upon the purpose for which the sheep were driven into the state. If for the purpose of being grazed, they are expressly within the first section of the act. But if for the purpose of being driven through the state to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves by grazing while actually in transit."

A leading case on the subject is that of *Swift & Company v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276. The defendants were charged with violation of the federal anti-monopoly law. It was urged that defendants were engaged in the business of buying live stock at Chicago, Omaha and other points, slaughtering such live stock at their places of business in the different states and converting such live stock into meat for human consumption. Defendants were also engaged in the business of selling such fresh meats at the several places where they were so prepared to dealers and consumers in various states of the United States other than those wherein the meats were prepared. The meats when so sold were transported over a railroad to the dealers and consumers. Defendants were also engaged in the business of shipping such fresh meats to their respective agents at markets in other states for sale by these agents to dealers and consumers. The defendants' slaughtering establishments were largely in different states from those of the stock-yards, and the sellers of cattle largely in different states from either. It was objected that the part of the bill charging a combination of independent

dealers to restrict competition of their agents when purchasing stock for them in the stockyards did not constitute a case of commerce among the states. Of this the court said:

"Taking up the latter objection first, commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of cattle is a part and incident of such commerce. What we may say is at least true of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale is in point of law consummated. See *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. Ed. 254, 24 Sup. Ct. Rep. 151. But the 6th section of the bill charges an interference with such sales, a restraint of the parties by mutual contract, and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

It should be added that the cattle in the stockyards are not at rest to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365."

This Court also held that the selling of meats by persons in other states after shipping to their agents, and through them selling to buyers in other states, was interstate commerce. In this connection we wish to call attention to the opinion of the court below in the same case (122 Fed. 529, 533) followed by this Court, in which Judge Grosscup said:

"Coming now to the other branch of the transaction—the sales by the defendants—a like result follows. Unquestionably it is interstate commerce when purchasers from other states buy directly from the defendants, and have the meats shipped to them by the vendors. The situs of such a transaction, both as to initiatory intercourse, and as to transportation in furtherance of the exchange, includes a state other than the one from which defendants deal.

I think the same is true of meat sent to agents, and sold from their stores. The transaction in such case, in reality, is between the purchaser and the agents' principal. The agents represent the principal at the place where the exchange takes place; but the transaction, as a commercial entity, includes the principal, and includes him as dealing from his place of business. Indeed, such privity exists between the principal and the transaction that he could, at the instant, as a citizen of another state, sue upon the transaction in the Federal Courts; nor have I any question that if the conditions of this case were reversed, so that the defendants were invoking the shelter, instead of seeking to escape, the obligations of the commerce clause, federal law would be found equal to the protection asked."

This Court distinguished the case of *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. Rep. 40, where suit was brought against local commission merchants at the stockyards to restrain them from entering into agreements as to the commission to be charged on sales of cattle. The court said the brokers were not buyers and sellers, as they only furnished facilities for the sale and were not a part of interstate commerce.

It thus appears from the foregoing cases that where cattle are shipped from one state to stockyards in another and there the ownership is changed, the live stock converted into meat and forwarded to points in other states, the whole is interstate commerce, as the cattle are, when started on their journey to the stockyards, sent with the expectation that they will end their transit after purchase in another state, with only the interruption necessary to find a purchaser. Stress is laid on the fact that such is a recurring practice. The present case is much stronger than that of *Swift & Company v. U. S.*, for here the gas moves without interruption or change in ownership from the gas fields in Oklahoma to consumers in Kansas and Missouri. It is more than a recurring course of dealing. It is constant and continuous. When the gas is started in its course of transportation it is with the intent and purpose that it shall be delivered to consumers without interruption in transportation. The *Swift & Company* case is decisive and stamps the transportation from the Oklahoma gas fields to consumers in Kansas and from Kansas to consumers in Missouri as interstate commerce.

In the Swift & Company case there was a use of local agents at the termination of the journey in disposing of the product; there was a stoppage and storage at the stockyards; there was a change of the article from live stock to dressed beef; the ultimate destination was unknown, as well as the ultimate consumer; there was no privity of contract between the ultimate consumers and Swift & Company; yet the transaction from the beginning to the delivery of the dressed meat through the local agents to the consumers was held by this Court to be interstate commerce.

In *Southern P. Terminal Co. v. Interstate Commerce Commission*, 31 Sup. Ct. Rep. 279, 219 U. S. 498, the facts were: The Southern Pacific Terminal Company owned no locomotives or cars, but possessed certain wharfage privileges at the Port of Galveston. It leased one pier to a shipper by the name of Young, which relieved him from all wharfage charges except as included in the yearly rental. The Terminal Company was a party to numerous circulars issued by the Southern Pacific Railroad Company, which circulars showed terminal charges on export cottonseed cake and meal. The Terminal Company contended that the order of the Interstate Commerce Commission directing it to desist from giving privileges and undue advantage to Young transcended its jurisdiction in that it regulated commerce purely intrastate and also purely foreign, neither of which was subject to its authority. The following language is taken from the opinion:

"In support of this contention it is insisted that the evidence shows the following facts: The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana, and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and way-bills, showing the point of origin in those states and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships' bills of lading made to his order.

This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is a final point of concentration and manufacture, the cottonseed cake being there manufactured into meal and sacked for export. But this does not distinguish between the meal and the cake, nor between the meal that is purchased at points outside of Texas and directly exported from that so purchased and manufactured on the wharves of the Terminal Company. Nor does it take account of the fact that the wharves were intended for shipping facilities, a means of transition from land carriage to water carriage. It is manifest, as we have said, that to make the wharves manufacturing or

concentrating points for one shipper, and not for all, is to give that shipper a preference. And, being a preference, the traffic necessarily comes under the jurisdiction of the Interstate Commerce Commission. In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the trans-shipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose."

This Court reached the same conclusion in *T. & N. O. R. Co. v. Sabine Tram Company*, 227 U. S. 111, 33 Sup. Ct. Rep. 229. Lumber was being shipped from an interior point in Texas to Sabine, within the state of Texas. There it was switched to the docks in reach of ships' tackle and was there loaded into chartered vessels and carried to foreign ports. The Sabine Tram Company sold the lumber to W. A. Powell Company, delivered f. o. b. cars at Sabine, Texas. After the lumber arrived at Sabine it was

switched to the docks at the instance and under the direction of the agents of Powell Company. If the shipment from the interior point in Texas to Sabine by the Sabine Tram Company was an intrastate shipment, the rate was  $6\frac{1}{2}$  cents per hundred pounds; and if it was a part of an interstate shipment, the rate was 15 cents per hundred. Fifteen cents was charged by the railroad, and the Sabine Tram Company sought to recover the difference. The contention of the Sabine Tram Company was that the continuity of movement was the test to determine the character of the shipment to Sabine; that is, an unbroken movement proceeding under the original arrangement of shipment; that there were no means or arrangements for the movement of the lumber in Sabine, that being left to intervening third parties, and a subsequent act after it was delivered to Powell Company. After reviewing the case of *S. P. T. Co. v. Interstate Com. Com.*, *supra*, 31 S. Ct. 279, 219 U. S. 498, and *Railroad Commission v. Worthington*, *post*, 225 U. S. 101, 32 S. Ct. 653, the court said:

"It is said, however, that the Sabine Tram Company had no connection with the lumber after its arrival at Sabine, and had no concern with its destination after it came into the hands of the Powell Company, and had no particular knowledge thereof. Like circumstances undoubtedly existed in *Southern P. Terminal Co. v. Interstate Commerce Commission*. It did not prevail there and cannot prevail here. The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real

and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard; and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign.

That it is the nature of the traffic, and not its accidents, which determines its character, is illustrated by *Railroad Commission v. Worthington, supra*."

This Court then proceeds to distinguish the case of *G. C. & S. F. v. Texas, supra*, 204 U. S. 403, 51 L. Ed. 540, 27 S. Ct. 360, by saying that not until the corn was delivered to the Hardin Company at Texarkana, and after it had been held at that point for five days and the freight paid did the Hardin Company acquire the means of fulfilling its contract with Saylor & Burnett, and then, and not until then, did it start to fulfill its contract with Saylor & Burnett. After making the distinction above noted the court continues:

"The facts in the case at bar are different. The lumber was ordered, manufactured, and shipped for export. And we say 'shipped', for

we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipment was a perfectly natural one, and did not change the relation of the Powell Company to it, and make the lumber other than lumber purchased at Ruliff, and started from there in transportation for a foreign destination. The findings are explicit and circumstantial as to this. And this shipment was not an isolated one, but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine. (*Swift & Company v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276.) Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

A similar decision was reached in the case of *Railroad Commission of Louisiana v. T. & P. Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. Rep. 837. Lumber was shipped under local bills of lading from interior points in Louisiana to New Orleans, there to be delivered to a shipper, but intended by the shipper to be exported to foreign countries and treated accordingly by both shippers and carriers. In applying the foregoing cases to the facts in the latter case this Court said:

"The principle enunciated in the cases were that it is the essential character of the com-

merce, not the accident of local or through bills of lading, which determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans."

In the Sabine Tram Company case, *supra*, and in *Railroad Commission of Louisiana v. T. & P. Ry. Co.* *supra*, not only were the ultimate consignees unknown to the shipper, but the destination itself had not been determined when the shipments commenced their journeys. There was no privity of contract between shipper and the ultimate consignee; there was an intervening service by another carrier at the wharf; there was a change of ownership of the article transported; and yet the entire transaction constituted interstate commerce and was not subject to the rates prescribed by the state.

As in the Sabine Tram Company case, the natural gas when it leaves the field in Oklahoma is intended for the consumers' burners attached to the other end of the lines. While the names of these consumers are unknown to the plaintiff receiver and while there may be no privity of contract between the plaintiff receiver and such consumers, yet the plaintiff receiver is assured that

the natural gas so started by him will be consumed at the burner tips in Kansas and Missouri, for there is no other outlet for it.

It is a matter of public knowledge that the great bulk of the natural gas furnished the 45 cities supplied by plaintiff receiver comes from Oklahoma and is transported by the system of pipe lines operated by plaintiff receiver. So when a consumer attaches his service line to the distributing system and asks for natural gas, in effect he places a continuing order with the plaintiff receiver to transport natural gas from Oklahoma direct to his burner tips.

The course of travel of the gas is much more certain than that of the lumber started on its way to Sabine. There is no opportunity for diverting the shipment in transit. The only thing known to the shipper in the Sabine case was that the lumber was intended for export. Here the receiver knows that the gas started in Oklahoma will be consumed in some one of the 45 cities and towns supplied by him by consumers whose service lines are already connected to the system. The lines of the distributing companies in the various cities are more directly connected and continuous than the railroads and the wharf in the Sabine Tram Company case. The system of pipe lines is continuous from the wells in the field to the consumers' burner tips. From the very nature of the method of transporting natural gas there can be no transfer in transit. The receiver's lines, the distributing companies' lines, and the consumers' service lines are as directly connected as is one

joint of pipe in the main trunk line to the next joint. Unlike the Sabine Tram Company case, there is no change of title. The ownership of the natural gas remains in the plaintiff receiver from the time it is started on its journey in Oklahoma until it is consumed at the burner tips. The present case is one of much more rapid transportation, much more direct connection, and less incidental service by third parties, than any case ever before submitted to this Court involving the transportation and delivery of an article in interstate commerce.

Mr. Justice Hughes in the case of *Pennsylvania R. v. Clark Brothers Coal Mining Company*, 238 U. S. 456, 35 Sup. Ct. Rep. 896, in passing upon the question of the right of redress of a shipper for unjust discrimination in the matter of coal car distribution discussed all the late cases of the Supreme Court of the United States on the question of interstate commerce. The proposition was again laid down that in determining whether commerce is intrastate or interstate regard must be given to its essential character. Mere billing or the place at which title passes is not determinative.

The gas transported by the plaintiff is not sold to the distributing companies but is sold direct to the consumers, the receiver obtaining a certain per cent of the total collections for the gas for its transportation from the wells to the distributing company while the distributing company gets a certain per cent for the distribution of the gas from the gates of the city to the consumers' meters.

*The character of the commerce, however, would*

be unchanged if the sale was made outright to the distributing company. In the Clark case the coal was sold f. o. b. cars at the mines, but the fact that the coal was to be transported to other states made it interstate commerce and the collecting of cars for the purpose of transporting the coal was held to be also a part of interstate commerce.

The case is cited with approval by this Court in *Pennsylvania Railroad Company v. Sonman Shaft Coal Company*, 37 Sup. Ct. Rep. 46, 242 U. S. 120, in which it was held that the sale and delivery of coal f. o. b. at the mine for transportation to purchasers in other states was a movement in interstate commerce and the facilities required are facilities of interstate commerce. The Supreme Court of Pennsylvania had decided that as the coal was sold f. o. b. at the mine the commerce involved was intrastate, even though the coal was going to purchasers outside of the state. This Court held that this was error. It was interstate commerce and not subject to state regulation.

A very late case by this Court is that of *A. T. & S. F. R. Co. v. Harold*, 36 Sup. Ct. Rep. 665, 241 U. S. 371. It is necessary to analyze the facts in this case in order to understand the point decided. The car of corn was shipped from Yanka, Nebraska, over the U. P. Railroad and was consigned to Topeka, Kansas. At Topeka, Kansas, the car was delivered to the A. T. & S. F. R. Co., but that company finding the car defective refused to accept it. The corn was transferred to another car and that was delivered to the A. T. & S. F. R. Co., which transported it to Elk Falls, Kansas.

The question in the case was whether the shipment from Topeka to Elk Falls was intrastate or whether it was part of the original interstate movement from Yanka, Nebraska. The case is important because it involved a change of carriers and a change of ownership of the corn after it left Yanka, Nebraska, and before it reached Elk Falls, Kansas. This Court decided that notwithstanding the change of carriers and the change of ownership and the fact that the original bill of lading had been surrendered and a new one issued, yet the movement from Topeka to Elk Falls was not intrastate but part of the interstate movement that was contemplated at the time the shipment began, although the definite point of delivery of the car was not known at the time the movement was commenced.

The case of *Railroad Commission v. Worthington*, 225 U. S. 101, 32 Sup. Ct. Rep. 653, is directly in point. Worthington was the receiver of the Wheeling & Lake Erie Railroad Co., and brought suit in the United States Circuit Court for the Northern District of Ohio against the Railroad Commission of Ohio to enjoin the enforcement of an order of the commission fixing and establishing a rate of 70 cents per ton on what is called "lake cargo coal," transferred from points in eastern Ohio to the port of Huron, Ohio, on Lake Erie, and thence by lake vessels. An attempt was made to dismiss the appeal to this court from the Circuit Court of Appeals on the ground that as the bill in intervention was ancillary to the receivership suit, the jurisdiction of the Court of Appeals was

determined by the original bill, and its decree was therefore final. This Court held that as the bill in intervention raised a federal question it was therefore appealable to this Court. This Court said of the interstate commerce feature:

"The question thus presented is: Was the Railroad Commission of Ohio authorized to put in force the rate in question as to lake cargo coal? It is not necessary to review the cases in this Court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void. (*Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. Rep. 277.) And an order made by a state commission under assumed authority of the state, which directly burdens or regulates interstate commerce, will be enjoined. (*McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. Rep. 722.)

The question is, then, one of fact. Does the transportation which the rate prescribed by the Railroad Commission of Ohio covers constitute interstate commerce?

It is true that the shipper transports the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron or Lake Erie. The so-called 'lake-cargo coal' is necessarily shipped beyond Huron. If it stops there, another and higher rate applies. Practically all of it is put on vessels for carriage beyond the state, usually to upper lake ports,

and then, and only then, the 70-cent rate fixed by the commission applies. This 70-cent rate covers the transportation of coal to Huron, the placing of it on board vessels, and, if necessary, trimming it for the continuance of its interstate journey. It is true, as argued by the learned counsel for the commission, that this coal may be accumulated in large quantities at Huron, and only taken out of the accumulated lots from time to time, when it is to be put upon vessels and shipped out of the state, but it must always be remembered that this 70-cent rate applies solely to such coal as is in fact placed upon vessels for carriage to beyond the state points; and, as the Circuit Court said, the substance of things is not changed by the fact that a small part may be unloaded at one of the Ohio islands in Lake Erie. The situation then comes to this: that the rate put in force is applicable only to coal which is to be carried from the mine in Ohio to the lake, there placed upon vessels and thence carried to upper lake points beyond the state. By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the commission, which is in controversy here, is applicable alone to the coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel, and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

After reviewing the cases on the subject, the opinion continued:

"It is contended that this transportation of the coal under the rate fixed by the railroad commission is not within the power and authority of the Interstate Commerce Commission under Sec. 1 of the act to regulate commerce, which makes the provisions of the act inapplicable to the transportation of property wholly within one state, and not shipped to or from a foreign country, from or to a state or territory; and, furthermore, that a transportation of the character here in question is only within the jurisdiction of the Interstate Commerce Commission when it is a transportation partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment; and therefore that the subject matter in question is left within the state jurisdiction. On the other hand, it is contended that this transportation is within the jurisdiction of the commission under the act to regulate commerce. It is enough to now hold, as we do, that the establishing of the rate in question is an attempt to regulate interstate commerce, and is therefore beyond the power of the state or a commission assuming to act under its authority.

We therefore reach the conclusion that, under the facts shown in this case, the Railroad Commission, in fixing the rate of 70 cents for the transportation above described, attempted to directly regulate and control interstate commerce, and, for that reason, the enforcement of its order should be enjoined."

If, therefore, the shipment is started on its journey from one state to another with the purpose that it shall be delivered to the consumer, and if the shipment moves continuously from a point in one state to consumers in another state the entire transportation is interstate commerce. The fact that in the present case the natural gas moves part of the way in the pipe lines of the receiver and part of the way in the pipe lines of the distributing companies makes no difference in the character of the commerce. The movement is continuous and the purpose is not changed. At the inception of the transportation the intent and purpose is to move the natural gas continuously until delivered to the consumer in another state. That purpose and intent is carried out in every instance from the time the transportation is commenced. The destination of the gas is known at the time the transportation begins. The natural gas thus moved is intended for delivery to consumers in another state. There is no stoppage in transportation. There is no change in the title to the gas, though it moves through pipe lines of the distributing companies. The journey is continuous, and the distributing companies are paid on the basis of a percentage of the total charge made for the gas carried. (See 96 Ks., p. 378.) In other words, the distributing companies occupy the same position as connecting carriers, and the gas moves in a like manner as if a carload of coal was shipped from Oklahoma over a railroad, delivered to a terminal company at the outskirts of the city, and by the terminal company

delivered to the consignee. The terminal company is engaged in interstate commerce, and the carriage of the carload of coal is interstate commerce. (*United States v. Terminal Association of St. Louis*, 224 U. S. 383, 32 Sup. Ct. Rep. 507. *So. Pac. Terminal Co. v. I. C. C.*, *supra*, 31 S. Ct. 279, 219 U. S. 498.)

This is not a case like *G. C. & S. F. R. Co. v. Texas*, *supra*, nor is it like the case of *C. M. & S. T. P. Co. v. Iowa*, 34 Sup. Ct. Rep. 592, 233 U. S. 334, where the shipments were made from a point without the state of Iowa to Davenport, Iowa, and there held in the cars four or five days, bills of lading surrendered by the consignee, freight paid, and then shipments afterwards billed out in the same cars to points in Iowa pursuant to sales made after the cars had arrived at Davenport. There is no delivery of the natural gas to the consumer before the transportation is completed, nor is there any holding by the distributing company until a sale can be effected, but the gas is delivered to a destination known before the transportation is begun in Oklahoma. Neither is the gas paid for by the consumer when it is delivered to the distributing company, nor does the consumer control the movement of the natural gas at the time of the delivery to the distributing companies. The natural gas moves continuously to the destination and pursuant to a purpose fixed and known at the inception of its interstate journey. This transportation consequently falls within the doctrine of the *Worthington*, *Sabine Tram Co.*, *S. P. T. Co.*, and *Swift & Company* cases. As said in

the Worthington case, even though the interstate transportation may not be within the jurisdiction of the Interstate Commerce Commission, it is not subject to interference or regulation by state commissions. See also *United States v. Freeman*, 36 Sup. Ct. Rep. 32; *McNeill v. S. R. Co.*, 26 Sup. Ct. Rep. 732, 202 U. S. 543; *N & W. R. Co. v. Sims*, 24 Sup. Ct. Rep. 151, 191 U. S. 441; *Memphis v. Cumberland T. & T. Co.*, 218 U. S. 624, 31 Sup. Ct. Rep. 115; *Barker v. K. C. M. & O. R. Co.*, 94 Ks. 176, 178; *Kirby v. Railroad Co.*, 94 Kan. 491; *Baer Bros. v. D. & R. G. R. R.*, 233 U. S. 479, 65 L. Ed. 1055.

**The original package doctrine has no application to this case.**

Those seeking to sustain the authority of the state over various interstate commerce transactions have of late endeavored to seek comfort in an attempted analogy to an original package—this whether the thing transported be information or gas. In the Ticker Cases, 38 S. Ct. 438,—— U. S. —— (decided by this Court May 20, 1918), the highest court of Massachusetts applied the original package doctrine as to breaking bulk. (113 N. E. 192, l. c. 198.) Information was transmitted in Morse code over telegraph lines to Boston; there translated into English and then forwarded by means of ticker service to customers within the city. The Supreme Judicial Court of Massachusetts said:

“While no analogy between information and chattels can be perfect, the case at bar in principle is indistinguishable from a purchase of a quantity of like books by the telegraph companies in New York for a gross price for the lot, the transportation of these in interstate commerce to their Boston offices, where the original packages are opened and single books sold there to individual customers, to whom they are delivered by messengers of the telegraph companies. The method of dealing with them after the interstate commerce is ended by delivery in bulk at the main offices, is no part of interstate commerce. In this respect the case is like

the cabs of the railroad employed solely in the local transportation of passengers who have come in interstate travel, which are subject to local regulation and are not a part of interstate commerce. *Pennsylvania Railroad v. Knight*, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325. The ticker service under the circumstances here disclosed is subject to the law of the state. *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 241, 35 Sup. Ct. 387, 59 L. Ed. 552."

This Court, however, said the analogy to an original package breaking bulk was misleading and held the entire transaction from New York to the customers at the end of the ticker in Boston was interstate commerce and not subject to state regulation.

If the application of breaking bulk is misleading in that case it is equally misleading here. The original package argument is divided into phases, namely, (1) that the entire system is one huge reservoir, and (2) the drawing off of the first gas by consumers in the state of Kansas breaks the bulk.

We shall discuss the reservoir theory first.

It is absurd to say that a pipe line not exceeding 16 inches in diameter, extending from the gas fields in Oklahoma on the south to St. Joseph, Missouri, on the north, a total distance of approximately 400 miles, constitutes one huge reservoir. It has been held by this Court and it is admitted by defendants that the gas moving from Oklahoma through the trunk line into and across the state line into Kansas is being transported in

interstate commerce. If one end of this alleged reservoir is part of a transportation system for interstate commerce, then why is not the other end? The transportation of natural gas by pipe line is the only practical method of transporting natural gas. *Haskell v. Cowham*, 187 Fed. 403; *Pipe Line Cases*, 234 U. S. 548, 58 L. Ed. 1459; 34 S. Ct. 956. The method employed by the plaintiff receiver is the usual and customary manner of transporting natural gas. It is as rapid and continuous as science can make it. No other system or method has been suggested in the evidence, nor is any other system known. If there is any stoppage or storage in transit, it is but momentary, incidental and only such as is necessary in the transportation of gas in such huge quantities. The consumers in every 24 hours are drawing off through each service line gas for domestic use. In fact, this drawing off process is almost continuous.

The Missouri defendants have presented this question of the pipe lines being a reservoir in a little different way. They claim with reference to Kansas City that the natural gas is stored in holders and in the pipe lines for a short period before it is delivered to the consumers. It is true that at Kansas City at some times the distributing company accumulates a surplus which is held in old manufactured gas holders or tanks to meet the increased demands of sudden lowered temperatures. This storage is never for more than a few days or so. It is merely incidental and done for the purpose of rendering better service to the same consumers who were connected with the

distributing system when the same gas started on its way from Oklahoma and for whom that same gas was intended when it began its interstate journey.

To express the contention another way, the natural gas is stored in holders and the pipe lines as reservoirs from which the consumers draw off their supply as needed, the supply in the holders and pipe lines as reservoirs being constantly replenished by the pumping in of more gas transported from Oklahoma.

Defendants claim that during the night the gas is packed into the pipe lines, to be drawn off in the morning at the time of the peak load. Mr. Hurlburt, defendants' expert, admitted that no other method of transportation or storage is feasible, and the storage or packing in the pipe lines was a necessary element in the transportation of the gas and that if this storage did not exist it would be necessary to have much larger pipe lines—in fact, pipe lines and compressor stations so large as to be prohibitive. (Rec. p. 810.) Mr. Wyer in his evidence stated that the storage in the pipe lines and holders was only incidental to the transportation of the natural gas and was the customary method used in the practical transportation of natural gas over long distances. (Rec. p. 811.) Mr. Hurlburt admitted there was a constant and continuous movement of the gas from Oklahoma through the pipe lines in Kansas and Missouri to the burner tips of consumers in Missouri. He also admitted that the gas was always in motion because of the continual drawing

off of the gas by consumers during the night. (Rec. p. 810.) Mr. Wyer in his affidavit, Exhibit No. 2, (Rec. pp. 1125, 1137), and on the witness stand (Rec. p. 811), describes the movement of the gas: that it is never at rest, but is a constantly seething, moving mass between the gas sand in the field and the consumers' fixtures in the cities; that natural gas travels at enormous velocities in the mains, at a speed many times exceeding that of the fastest train, and that it can go only in one direction; that there is no delivery until the gas has not only passed through the consumer's meter, but is burned at the consumer's fixtures.

The continuous movement of the gas is also described in the opinion of the Supreme Court of Kansas in the Flannelly case, 96 Kan. 372, quoted in the decision of the lower court. (Rec. p. 590.)

The question thus presented to this Court is whether the incidental storage of natural gas in the pipe lines and in holders destroys the interstate character of the movement.

That the pipe line has, as we all know, unequal drafts made upon it during the different parts of the day; that the compressor engines are kept going substantially at the same rate during the whole day; that the result is, that at the times in the day when the draft upon the pipe line is least, the gas is packed into the pipe line through which it is transmitted, so that there are more molecules of gas in a given pipe space than at those periods of the day when a great draft is made upon the supply; that all the time the gas is in continuous motion, at varying speeds; that there is no hour in

the day when some drafts are not being made upon the system, so that there is always an outgo, that to some extent diminishes the quantity driven into the line by the compressors; and defendants contend that because there are more molecules in a given pipe line space at these certain times, such fact transforms the pipe line during those times from a transportation line to a storage line. Their whole contention is simply that the *diminished drafts* and the *continued pressure* result in packing into the given pipe space a greater number of gas molecules. Now to show the impossibility of this being a sound contention:

We all know that heat expands, and cold contracts, the size of gas molecules; that is to say, with the pressure constant (continuing the same), and no outlet, a cubic foot of gas-containing space will contain a greater or smaller number of gas molecules, as the temperature reaching that gas is high or low. Now the rule is, with relation to the effect of temperature on gas, that there is a diminution of one per cent (1%) in the space occupied by gas, by the dropping of approximately five degrees ( $5^{\circ}$ ) F. of temperature. So that, with a change of 50 degrees F. of temperature, there is about nine-tenths the space occupied by it that it occupies when the temperature is 100 degrees F. Temperatures differ at different places in the line, and at different hours in the day. The result under such a contention is that the same pipe is transformed from a transportation main into a storage line and from a storage line into a transportation main, as the temperature goes up

or down. In other words, the situation is very like the nightcap-sock in Goldsmith's poem, which was "a cap by night, a stocking all the day." The utter absurdity of such a contention in the light of such a situation is manifest by the mere statement of it.

The varying pressures are but incidents, and necessary incidents, to the business of transporting this commodity in interstate commerce. With infinitely more reason, could it be argued that a railroad car, while standing on the track waiting for the change of engines, is, by the fact of its being stationary, transformed into a warehouse, than it could be argued that the varying pressure and the varying number of molecules in the given space, resulting therefrom, change the transportation line, in which the gas is *all the time moving*, from a transportation line into a storage line. In a recent decision, *McFadden v. Alabama Gt. So. R. Co.*, 241 Fed. 562 (3rd C. C. A.), it was contended that the fact that, in transit, certain cotton stopped long enough to be compressed, changed the interstate character of the commodity and movement from interstate to state, the court very properly held that since the compressing of the cotton was a mere incident to the interstate transportation, it could not change the interstate character of the commerce to state commerce. This is in line with wheat that is brought by rail to the lake lines, and is passed through the elevator in order to be conveniently loaded into the vessels; it may rest in the elevator a day or more, and even be milled into flour, but such facts do not change the interstate character of the commerce.

The rule undoubtedly is, that goods started on an interstate journey retain their interstate character, and so remain within the dominion of the commerce clause of the Federal Constitution, from the time they start on such a journey until the delivery, and all things that may be done to or with the commodity, which are mere incidents to the transportation, in no wise change the interstate character of the transaction.

The court below asked the witness, Hurlburt, (Rec. p. 810), if continuing action of the compressor engines was necessary to maintain the pressure so as to enable the gas to be delivered in conformity with commercial necessities; the answer was that it was so necessary; the result from that is to show that the varying pressures are simply incidences of the transaction, and since the pressure has to be maintained, the compressing is not only an incident, but a necessary incident, to the interstate transaction; and so far from the situation presented by defendants establishing the intrastate character of the commerce, it demonstrates that it continues to be interstate commerce, since the changes in pressure are unavoidable incidents to the interstate commerce and can in no wise change its interstate character.

After the gas is stored in the holders it is forced back into the distributing company's lines and system by means of compressors. (Rec. p. 813.) That the transportation is not ended when it reaches the holders is shown by the evidence in this case and the statement of the court below in its decision of April 21, 1917, as follows (Rec., p. 593):

"In substance and effect there are continuing orders by the consumers to the receiver through the distributing company to supply them with gas from the Oklahoma fields. Such transactions have the character of interstate commerce at their inception, and this character continues until final delivery.

*Crenshaw v. Arkansas*, 227 U. S. 389, and cases cited.

"Even though the shipment is started before a definite order for a specific amount is given, still the continuous and usual course of business determines the character of the shipment."

The transportation is not completed until delivery to the consumer at his burner tips.

The analogy of the pipe line system to a huge reservoir lying on its side, tapped by service lines of the consumer, is misleading. If this pipe line system in contemplation of law is a huge reservoir, then the pipe line system in the Pipe Line Cases *supra* also constituted a huge reservoir. But this Court held otherwise. It also held otherwise in *West v. Kansas Natural Gas Co.*, *supra*, involving this same system of pipe lines. A truer comparison would be that the pipe line system, with the distributing companies' lines and the service lines constitutes one arterial system, with natural gas instead of blood flowing through the main arteries of trunk lines and the branch lines and through the branch lines diffused continuously to the capillaries or service lines, to its ultimate destination. In fact, the main trunk line system running from Oklahoma to the northern part of Missouri,

with branches to Topeka and Lawrence on the one hand, and to Kansas City and Joplin on the other, with innumerable smaller branches to other cities, and the distributing system at the end of each of these branches, with the service lines connected to the distributing system, constitutes a huge artery of commerce, and, being an artery of interstate commerce, is entitled to protection from state interference contemplated by the Commerce Clause of the Constitution of the United States.

Now let us turn to the other original package theory as advanced by the Supreme Court of Kansas, in the case of *State, ex rel. v. Flannelly*, 96 Kan. 372. The original package doctrine is applicable only to goods which have come to rest after their interstate journey and are intended to be transported no further in interstate commerce. Its purpose is to protect goods in the original package while in the hands of the importer until sold by him. It is not applicable, nor has it ever been applied, to goods in the actual course of interstate transportation. It has no application here as the natural gas moves continuously until delivered to the consumers. The natural gas is not mixed with the common mass of property within the state until it is sold and delivered to the consumer.

Another trouble with the analogy attempted to be drawn by the Supreme Court of Kansas, is that the natural gas in the service pipe belongs to the receiver and is paid for by the consumer at his meter. There is no storage of the gas in the pipes, as the Supreme Court would indicate. The gas is

moving almost continuously. There is not even the interruption that was true of the coal on the docks in the Worthington case, where it was held for some time, or of the cottonseed cake and meal in the S. P. T. Co. case, or the lumber at Sabine, as in the Sabine Tram Company case. The narrow application of the original package doctrine employed by the Kansas Supreme Court cannot be applied here.

The attempt to liken the case to the wagon and carload of corn ordered by the farmer has no application. No one would doubt that the horse or wagon or carload of corn while in the course of transportation and before it is delivered to the farmer is protected by the interstate commerce clause. The farmer occupies the position of the consumer, and not the distributing company.

We are not contending that after the natural gas reaches the consumer that it is subject to the protection of the interstate commerce clause, but we insist that the wagon and horse while being carried to the farmer and the common carrier who transports the wagon and horse are within the protection of the interstate commerce clause; and so the receiver who transports the natural gas and charges the consumers at the meter for the transportation, from the wells, the natural gas being continuously moved, is within the protection of the commerce clause of the Constitution of the United States, and not subject to state interference, although he is not within the jurisdiction of the Interstate Commerce Commission.

A pipe line cannot possibly be a package, and

not being a package the doctrine of the original package cases cannot be applied. A package is something that binds and holds an article within itself and does not permit it to pass outside of the borders of the package. A pipe line is no more a package than is a highway or railroad. A pipe line is primarily a conveyor and has a movement through it of different particles or different articles. Webster's Dictionary defines a pipe as a "long or hollow body, especially such a one as is used as a conductor of water or other fluids." It is thus seen that a pipe line is diametrically opposed to a package.

This Court in the Pipe Line Cases, 234 U. S. 548, 58 L. Ed. 1459, 34 Sup. Ct. Rep. 957, has recognized pipe lines as carriers. Pipe lines perform the same function as the rails of a railroad. They guide the movement of the article and prevent it from moving sidewise, aiding it in its movement forward. If a box car filled with wheat was broken open, the wheat would scatter all over the ground and would not be susceptible of further movement. A box car in one sense contains or holds the wheat, but no one would attempt to apply to it the original package doctrine and say that while a carload of wheat was in transit from Oklahoma to Missouri passing through Kansas, its interstate character would be lost by reason of the throwing out or leaking out of several bushels of wheat. Of course, the wheat that is thrown out and scattered over the ground ceases to be transported in interstate commerce, but the wheat left in the car and continuing on

its journey to Missouri has not lost its character as an article transported in interstate commerce. So in this case the natural gas which is taken out or drawn off from the pipe lines and consumed ceases to be a part of interstate commerce, but the natural gas which remains within the mains and continues on its course does not thereby lose its character as an article transported in interstate commerce any more than the wheat remaining in the car does.

In *Western Oil Refining Company v. Lipscomb*, 244 U. S. 346, 37 S. Ct. 623, the oil left in the tank car intended for Mount Pleasant, Tennessee, was still entitled to the protection of the interstate commerce clause after the withdrawal of the oil at Columbia, Tennessee. The taking of the oil from the tank car at Columbia did not place the oil so withdrawn or the remainder left in the tank car within the authority of the State of Tennessee.

Again, if the doctrine of the Supreme Court of Kansas is correct, the case of *Kelley v. Rhoads*, *supra*, was wrongly decided. In *Kelley v. Rhoads*, the sheep did not move continuously. In fact, they moved but eight or nine miles per day. They were at rest at night. Applying the doctrine announced by the Supreme Court of Kansas, if one sheep had been sold during the journey of the flock across the State of Wyoming, we would be obliged to say that the interstate character of the transportation of the rest of the sheep was lost. This, however, was not the case. Not only did the interstate character of the transportation extend to the balance of the flock, but as to the one sheep

sold the protection of the commerce clause would be over it until the transaction of the sale was completed. It is just as sensible to say that the shepherd and his dog are the package which held the sheep together in their interstate movement as to say that the pipe line is the package holding the natural gas. If the shepherd had mingled sheep bought within the State of Wyoming with the flock, and had permitted the whole flock to move forward, then according to the theory of the Supreme Court of Kansas, the interstate character of the whole flock would have been destroyed and the sheep would all have been subject to taxation. The mere statement of these matters shows the impossibility of applying the doctrine of the Supreme Court of Kansas to natural gas moving in pipe lines:

The Supreme Court of Kansas states:

"The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. \* \* \* If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas, to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale."

The Supreme Court of Kansas errs because it fails to recognize that the protection of the commerce clause extends not only to the transportation

of the article but to its delivery at final destination as well. The delivery is not completed until the natural gas reaches the consumers' burners.

In *Rossi v. Pennsylvania*, 238 U. S. 62, 35 Sup. Ct. Rep. 677, Rossi, who lived across the state line in Ohio, went into Pennsylvania, procured orders for liquor, returned to Ohio, loaded the liquor upon his wagon and crossing the state line delivered it to the residences of the purchasers in Pennsylvania pursuant to the contracts. This case too arose under the Wilson Act. In reversing the Supreme Court of Pennsylvania and holding that the transactions were within the protection of the interstate commerce clause, this Court said:

"As has been recently pointed out in *Kirmeyer v. Kansas*, 236 U. S. 568, 572, 59 L. Ed. —, 35 Sup. Ct. Rep. 419, the transportation of intoxicating liquor, as of other merchandise, from state to state, is interstate commerce, and state legislation which penalizes it or directly interferes with it, otherwise than as permitted by an act of Congress, is in conflict with the commerce clause of the Federal Constitution; and while Congress, in the Wilson Act, declared in substance that liquors transported into any state, or remaining therein for use, consumption, etc., shall, upon arrival in such state, be subject to the operation and effect of its laws enacted in the exercise of the police power, to the same extent and in the same manner as though the liquors had been produced in such state, and shall not be exempt therefrom by reason of being introduced in original packages, this does not subject liquors transported in interstate commerce to state regulation *until after*

*their arrival at destination and delivery to consignee or purchaser."*

Thus it is seen that interstate commerce does not cease until delivery to the purchaser or consignee.

The Supreme Court of Kansas in *State ex rel. v. Flannelly*, 96 Kan. 378, held that the natural gas here involved is not sold by the receiver to the distributing companies, but that the sale is to the consumers to whom the gas is delivered. It follows that interstate commerce does not cease until the delivery is made to the consumer and purchaser, and the transportation of natural gas from Oklahoma to consumers in the state of Kansas is within the protection of the commerce clause of the Constitution of the United States until delivery is made at the burner tips. The same is true of the natural gas produced in Oklahoma and Kansas and transported to consumers in Missouri.

**The incidental storage of natural gas in the course of transportation does not change the interstate character of the business conducted by the plaintiff receiver.**

In discussing the theory of breaking bulk in the original package doctrine we have to a large extent discussed the question of storage or stoppage of the gas. It is at most but incidental. If it be stored in a tank to furnish a surplus quantity to meet the demands of extremely cold weather, such storage does not change the interstate character of the business, because the very purpose of its storage is to aid that commerce, to assist in meeting a demand which cannot be filled by continuous transportation. The storage is no longer than that of the logs in the water at Port Arthur in the Sabine Tram Company case nor as long as that of the coal on the docks in the Worthington case, *supra*. It is not the principal feature of the transportation nor a matter that affects any large percentage of the commerce. (Rec., p. 813.) Judge Booth's finding on this phase of the question is complete and conclusive. In his opinion he sets out the facts as follows (Rec., p. 617):

"The question of storage has been presented and pressed with great earnestness, as being a very important factor to be taken into consideration in determining this question of interstate commerce. But to my mind the evidence shows that such storage as exists is merely incidental to the transportation of the gas, and in fact that it is a necessary incident

to the proper and efficient transportation of the gas. Hence, this storage being merely incidental, it seems to me that it does not change the character of the business from interstate to intrastate commerce."

Thus we see that the incidental storage is but in furtherance of the interstate commerce conducted by the receiver and a necessary part of it. In the transportation of oil by means of pipe lines it is pumped into receiving tanks at a station and later pumped out again on its journey. Yet such storage did not in the Pipe Line cases, *supra*, take away the interstate character of the commerce there involved. Here, as the court has found, storage is a necessary part of the transportation and the rule applied in the Pipe Line cases, in the Worthington case and in the Sabine Tram Company case, should be applied. The sheep in *Kelley v. Rhoads*, 188 U. S. 1, 23 S. Ct. 259, stopped over night on their journey. The cattle in *Swift & Company v. U. S.*, 196 U. S. 375, 25 S. Ct. 276, stayed in the stockyards for some little time. But the stoppage in either of these cases did not affect the interstate character of the commerce conducted. And the incidental storage and stoppage in this case should not make the commerce conducted by the receiver intrastate.

In *Cleveland C. C. & St. L. R. Co. v. Dettlebach*, 36 Sup. Ct. Rep. 177, 239 U. S. 588, this Court held that where goods had been received by the railroad company and placed in its freight house on September 27, 1911, and not called for by the consignee and remained in the railroad's possession

as warehouseman until November 1st, when through its negligence certain of the goods were lost, that the transportation had not ceased and the railroad company was liable under an interstate bill of lading because the movement in interstate commerce had not terminated.

In *Western Transit Company v. Leslie & Company*, 242 U. S. 448, 37 Sup. Ct. 133, the facts were these: The Western Transit Company, operating steamers between Buffalo and other points on the Great Lakes, formed with the New York Central Railroad a "lake and rail" line between Michigan and New York City. Among the privileges offered by this line was the right "in transit of free storage and diversion at Buffalo." That is, a shipper instead of forwarding his goods from Michigan direct to New York City was entitled without the payment of any extra charge to have them stored at Buffalo for a period to await further orders and be forwarded later to New York. The shipper was also given the right to change the ultimate destination of the stored goods upon proper adjustment of the rate.

On September 23, 1908, Leslie & Company delivered to the Transit Company at Houghton, Michigan, for shipment over this line to New York City twenty-five tons of copper ingots with directions to store the same upon arrival at Buffalo to await further shipping directions. The copper reached Buffalo September 30th and was placed in the warehouse. Nearly four months later about one ton of the copper was stolen from the warehouse. The shipper brought an action in the City Court of Buffalo to recover its value and

secured judgment for \$271.38. The Transit Company contended that the damages recoverable were limited to \$94.10, that is, the value not to exceed \$100 a ton as stipulated in the bill of lading. The bill of lading contained this language:

"To be held at Bflo. for orders. Value not to exceed \$100 per net ton. Limited by written agreement."

On the authority of *Cleveland, C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177, and *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469, this Court decided that the limitation contained in the interstate bill of lading applied and that the recovery was limited to \$100.

In *Southern Railway Company v. Prescott*, 36 Sup. Ct. Rep. 469, 240 U. S. 632, thirteen boxes of goods were shipped from a point in Virginia to a point in South Carolina. The goods arrived at destination on June 23rd. After notice of arrival of the goods the consignee paid the entire freight charges and four boxes were taken away. Nine boxes remained to meet the consignee's convenience in removal. Before removal they were destroyed by fire. Mr. Justice Hughes delivered the opinion of this Court and held that the transportation had not ceased until actual delivery to the consignee and that as the lost goods were still in interstate commerce, the terms of the interstate bill of lading controlled.

If the storage of goods in the warehouse of the carrier for sixty-one days did not destroy the inter-

state character of the shipment, then the storage of gas over night or even for a day or two cannot destroy the interstate character of the commerce conducted by the plaintiff receiver. Whatever storage there may be of natural gas is not for the purpose of selling the same or determining to whom it shall be delivered, but it is for the purpose of furnishing a surplus to be used by consumers known to demand the same and for whom the gas is intended before it leaves the State of Oklahoma. The contention of the defendants in this respect is untenable. This Court has already decided in *West v. Kansas Natural Gas Co.*, *supra*, that the inception of the journey of the natural gas in the fields in Oklahoma is interstate. The same character continues and attaches to the natural gas until it reaches its ultimate destination at the consumers' burner tips.

**Neither plurality of carriers, change of ownership in transit, use of local agencies and franchise privileges, nor incidental storage can change the interstate character of the transportation of natural gas from Oklahoma to consumers in Kansas and Missouri.**

Every argument urged by the defendants has already been decided adversely to them by this Court. We have seen that in *West v. Kansas Natural Gas Company*, *supra*, the character of the interstate commerce was determined to be national rather than local; and two recent cases decided by this Court conclusively answer every other contention urged by the defendants.

In *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 37 Sup. Ct. Rep. 623, the Western Oil Refining Company, an Indiana corporation, paid under protest an occupation and privilege tax in Tennessee. The company operated an oil refinery in Illinois and a steel barrel factory in Indiana and was selling the products of its refinery and factory upon orders taken by traveling salesmen in its employ. The statement of facts as set forth by Mr. Justice Van Devanter indicates the manner in which the business was transacted:

“For the purpose of filling orders so taken in Maury county, Tennessee, it shipped into that county from its refinery a tank car of oil and from its factory a car of steel barrels. Both cars were billed to the plaintiff at Columbia, in that county, and, after the orders from that place were filled, were rebilled to

the plaintiff at Mount Pleasant, in the same county, where the orders from the latter place were filled. At both places the orders were filled directly from the cars by a traveling agent of the plaintiff and the purchase price was collected at the time—this being what was contemplated when the orders were taken. If the order was for both oil and barrels, the oil was drawn out of the tank car into the barrels and the two were jointly delivered; and if oil alone was ordered, it was drawn from the tank car into barrels otherwise provided by the buyer. When the cars were originally shipped they contained just the quantity of oil and the number of barrels required to fill the orders from the two places, and the plaintiff intended that they should remain at Columbia only long enough to fill the orders from that place and then should be sent to Mount Pleasant, so the orders from that place could also be filled. The quantity of oil and the number of barrels required to fill the orders from Mount Pleasant were in the cars continuously from the time of the original shipment until the cars reached that place. The plaintiff had no office or local agent in Tennessee, nor any oil depot, storage tank, or warehouse in that state."

The objection to the tax was that it was a tax upon interstate commerce. In the county court judgment was granted for the refinery company, which was reversed by the Supreme Court of the state, holding that what was done up to and including the filling of the orders from Columbia was interstate commerce but what was done thereafter was intrastate commerce, and afforded

an adequate basis for a tax. This Court reversed the decision of the Supreme Court of Tennessee, stating:

"On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this Court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. Here, when the cars were started from Illinois and Indiana, it was intended by the shipper, as is expressly conceded, that they should be taken to Columbia, Tennessee, where a portion—a definite portion—of the contents of each to be taken out and delivered, and that the cars, with the remainder of the contents, should proceed to Mount Pleasant in the same state; and this is what actually was done. Columbia was the destination of only a part of the merchandise, not of all. As to part, it was merely the place of a temporary stop en route. The original billing to Columbia and the rebilling from there to Mount Pleasant operated in the same way as would an original billing to Mount Pleasant, with the privilege of

stopping en route at Columbia to deliver a part of the merchandise. Indeed, it is stipulated that the reason for not billing the cars through to Mount Pleasant in this way was because the carriers receiving the shipments 'would not allow such a stop-over privilege, though the same is allowed on nearly every other kind of shipment.' Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place. It results that the tax was imposed for carrying on interstate commerce, and so was repugnant to the Constitution and void."

If the taking of oil out of the tank car at Columbia did not make the rest of the shipment intrastate, then the taking of gas out of the pipe line at the first point across the state line in Kansas did not make the business conducted by the plaintiff receiver intrastate. There is the same intention at the time of the beginning of transportation in Oklahoma, to deliver it to the consumers' burner tips in Kansas and Missouri, attached to the distributing companies' lines, as there was in the above case when the shipment was started on its journey from outside the state of Tennessee to Mount Pleasant, Tennessee.

Every contention of the defendants in this case

is answered in the "Ticker Cases," 38 Sup. Ct. Rep. 438, — U. S. —, *supra*.

The New York Stock Exchange made a contract with the Western Union Telegraph Company and other companies to furnish prices quoted in transactions on the exchange to those companies. These contracts specified a lump sum to the exchange for the service furnished. The telegraph companies, in their turn, furnished quotations to their patrons at intervals of more than fifteen minutes, subject to discontinuance upon the objection of the exchange and were allowed to furnish continuous service by ticker to subscribers, provided the latter signed applications in duplicate, one of which was to be approved by the exchange. The Gold & Stock Telegraph Company's business is carried on by the Western Union in the name of the former. The quotations are furnished to the Western Union at New York, telegraphed by it in Morse code to Boston, there translated into English, thence transmitted by an operator to the tickers in the offices of the brokers who have subscribed and have been approved. The United Telegraph Company, on the other hand, receives quotations for Boston alone, where is its principal office outside of New Jersey. These quotations are furnished by the exchange in New York, telegraphed to Boston, over the wire of the Postal Telegraph & Cable Company, and thence translated and transmitted as in the other case.

The highest court of Massachusetts decided that the ticker business was intrastate commerce subject to regulation by the Public Service Commis-

sion of that state. The Massachusetts court, in reaching this determination, as we have already shown, likened it unto an original package which broke bulk upon the delivery of the information in Morse code at the offices of the different companies in Boston, and held that the service in Boston was local and that the state had power to regulate the business as it was necessary for the telegraph company to use the streets and alleys within the city. It was also argued that there was a stoppage or storage in transit at the time of the translation from Morse into English. Thus were presented to this Court in that one case all of the arguments that are urged by the defendants here, to-wit, the breaking of the original package, the stoppage or storage in transit, delivery to a local agency, the use of local franchise privileges.

This Court held that the business was interstate commerce and not subject to state regulation. The following quotation from the opinion in that case by Mr. Justice Holmes is decisive of the questions here involved:

"It is enough that in our opinion the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices and that the interference with it was of a kind not permitted to the states. The supposed analogy that has prevailed is that of a receiver of a package breaking bulk and selling at will in retail trade. But it appears to us misleading. We also think it unimportant that the contracts between the exchange and the telegraph companies emphasize the element of quasi-sale for a lump sum and leave it to the interest

of the telegraph companies to find subscribers. Neither that nor the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the exchange. It does not matter if they have no contract with the exchange, directly. It does not matter that if the telegraph companies did not deliver to any given one the exchange could not complain. If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond.

"Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 126, 33 Sup. Ct. 229, 57 L. Ed. 442. Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character, and other cases to the same effect were cited. The principle was reaffirmed in *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; and is too well settled to need to be further sustained. *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 349, 37 Sup. Ct. 623, 61 L. Ed. 1181. See *Swift & Co. v. United States*, 196 U. S. 375, 398, 399, 25 Sup. Ct. 276, 49 L. Ed. 518. It is admitted that the

transmission from New York to Massachusetts by the telegraph company was interstate commerce. If so it continued such until it reached 'the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co. v. Louisiana R. R. Commission*, 236 U. S. 157, 163, 35 Sup. Ct. 275, 59 L. Ed. 517.

"If the transmission of the quotations is interstate commerce the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control—to change the criteria by which customers are to be determined and so to change the business. It is suggested that the state gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U. S. 324, 357, 33 Sup. Ct. 90, 57 L. Ed. 243, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 35 Sup. Ct. 57, 59 L. Ed. 193."

The instant case is even stronger than the Ticker Cases. In the Ticker Cases there was

a translation in the Boston office from Morse Code to English. Here, however, there is no change in the form of the article transmitted. The natural gas which leaves Oklahoma is the same natural gas as that delivered to the consumers in Kansas and Missouri. In the Ticker Case the information came in on one wire and was transferred by human agency to another. The pipes of the distributing company are connected with the pipes of the plaintiff receiver; no intervening external agency, human or otherwise, transmits the natural gas from one to the other. It moves of its own pressure, just as a stream of water flows in its various channels. There is no stoppage, even for a moment, at the point where the gas passes from the receiver's lines to the distributing company's lines. The same is true of the passage of the gas from the distributing company's lines to the service lines of the consumers. The ultimate recipients of the information in the Ticker Cases were unknown to the New York Exchange. The Exchange's reward was a lump sum. The local company in Boston solicited and secured the customers and collected the money for the service rendered by it. Here the consumers are ascertainable through the connections with the pipe lines of the distributing company. The compensation of the distributing companies is but a percentage of the total charge to the consumer. Whether the distributing companies contract with the consumers in their own names or in the name of the receiver is immaterial. The existence of a contractual relation is not essential.

Privity of contract between the Exchange and the ultimate recipient of the information was not necessary in the Ticker Cases and it cannot be here. At Boston the local company broke up the information received from New York and distributed it to hundreds of customers. Here the body of gas diffuses itself under its own pressure through service lines to hundreds of consumers. The breaking up of the single bit of information received from New York did not end the interstate commerce conducted by the telegraph company. The diffusion of natural gas under its own pressure through service lines to hundreds of consumers cannot in this case terminate the interstate character of the transaction. In the Ticker Cases a monthly charge was made to the customer, part of which was a readiness-to-serve charge. That fact did not make the commerce intrastate. A readiness-to-serve charge in this instance cannot make the commerce other than interstate. Local agencies and franchise rights were employed in the Ticker Cases. In one instance the Boston company bore no subsidiary relation to the Postal Telegraph Company, which acted as the carrier between New York and Boston.

Yet all these circumstances did not in that case subject to state regulation the interstate commerce beginning at New York and ending with delivery of the information to the customer in Boston. Like circumstances in this case cannot subject the interstate commerce commencing with the wells in Oklahoma and ending with the consumers' burner tips in Kansas and Missouri to the unjust burdens

imposed by state authorities. The transmission of intelligence in the Ticker Cases from New York to the customers in Boston was as rapid and continuous as science could make it. The transportation of natural gas as conducted by the plaintiff receiver from the wells to the consumers' burner tips is as rapid and continuous as science can provide. No better, different, or quicker method for the transmission of natural gas has been suggested in these proceedings. There is none. The pipe line system of transportation is the only practical method of moving natural gas. There is no unusual interruption in the forwarding of the gas from the wells to the consumers. No unusual or uncalled-for interruption occurs which can change the interstate transaction as begun in Oklahoma to intrastate commerce before delivery is completed to the burner tips in Kansas and Missouri. As Judge Booth says in his opinion of August 3, 1917 (Rec., p. 617), in 245 Fed., l. c. 953:

"But to my mind the evidence shows that such storage as exists is merely incidental to the transportation of the gas, *and in fact that it is a necessary incident to the proper and efficient transportation of the gas.*" (Italics ours.)

The transportation in this case being the normal and usual method of transporting natural gas from wells to the consumers, it follows that what this Court has decided was interstate commerce when the gas started in Oklahoma continues to be interstate commerce until final delivery is made to

the consumers in Kansas and Missouri, to whom it was the intention to forward the natural gas at the inception of its journey. It follows that the contention of the defendants, whether urged on the ground of breaking the original package, use of local facilities, agencies and franchise privileges, storage in transit, change of ownership, plurality of carriers, are each and all without merit and unfounded. The decrees of the District Court should be affirmed.

**The mixing of intra and interstate natural gas in the same pipe lines does not give the state authority over the mass.**

That a state does not obtain control over the natural gas transported in interstate commerce by reason of the admixture with a small part of natural gas transported in intrastate commerce is admitted in the case of *State v. Stock Yards Company*, 94 Kan. 96, 99, where it is said:

"The defendant pleads that all business done over the tracks referred to is interstate commerce, but this broad averment is limited by these specific statements:

'That a train of live stock arriving at the terminal facilities of this defendant will be composed of say forty cars of live stock that is interstate, and mingled therewith there may be four or five cars that are intrastate; that this defendant will have no knowledge of the origin of said cars until they are pulled up to the unloading dock, in, over and upon the terminal facilities of the defendant herein.'

The contention is made that this results in such a mingling of the two classes of shipments that the intrastate must be regarded as incidental to and merged in the interstate. *The state of course cannot interfere with the interstate business done by the defendant*, but we do not think the allegations quoted exhibit such a confusion of interstate and intrastate shipments as to cause the latter to lose their identity as such or to exempt them from state control. (*The Minnesota Rate Cases*, 230 U. S. 352.)"

An extended discussion of the subject is found in the Minnesota Rate Cases, *supra*:

"The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

As the natural gas moves continuously from the time it leaves Oklahoma until it reaches the consumer, there can be no question of its becoming a subject of state control by reason of its being at rest.

The same is true of the natural gas produced in Kansas and transported and sold to consumers in Missouri.

In addition to the foregoing cases, we call attention to the cases of *Railroad Commission v. Worthington*, *supra*, 225 U. S. 101, 32 S. Ct. 653, and *Swift & Company v. United States*, *supra*, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518; *Crutcher v. Kentucky*, 141 U. S. 47, 11 S. Ct. 581,

35 L. Ed. 649, as holding that the fact that intrastate shipments are also concerned and intermingled with interstate shipments does not take from the interstate commerce the protection given it by the Constitution of the United States.

**Additional contentions of the Missouri defendants on the interstate character of the business.**

It must be borne in mind that the business conducted in Missouri is entirely interstate. There is no gas produced in Missouri. All gas supplied by the receiver to consumers in Missouri comes from either Kansas or Oklahoma. Eighty-five per cent of it all comes from Oklahoma. The cases cited cover all phases of the contention of the Missouri defendants.

The Missouri defendants stress incidental storage, which they claim sometimes occurs at Kansas City. They also stress the fact that no contract is made by the consumer with the plaintiff receiver, but that all agreements are between the distributing companies and the local consumers. As we have already shown, this Court in the Ticker Cases has decided that there is no necessity of covenant or bond. Privity of contract is a non-essential. It is the usual and customary course of business which determines the matter. The usual and customary course of business in this case is the transportation of natural gas from Oklahoma and Kansas to consumers in Missouri with intention at the time such article of commerce is started on its journey to deliver it to the burner tips in the State of Missouri. Whatever interruption there may be, if any at all, is, as Judge Booth says, "a necessary incident to the proper and efficient transportation of the gas." (Rec., p. 617.) The transportation is as fast and continuous as

science can make it, and, under the decisions of this Court referred to, neither incidental stoppage nor the lack of a contract takes away from the interstate commerce conducted by the plaintiff receiver the protection of the commerce clause of the Constitution of the United States.

Much emphasis is placed by some of the Missouri defendants on the following conclusion incorporated by them into the statement of evidence (Rec., p. 813):

"After the gas enters the mains of The Kansas City Gas Company, that Company has the actual physical possession and complete control over it and over its distribution and sale."

This is not correct. The Kansas City Gas Company received only  $37\frac{1}{2}\%$  of the amounts paid by consumers, the rest went to the receiver. The local company does not control the price charged the consumers. Lists of the names and amounts due from delinquent customers were furnished the receiver. The receiver has certain rights of inspection over the lines of the distributing company. But these matters are immaterial. If we were to concede the conclusion above quoted is correct, nevertheless it would not change the determination of this case.

In the Ticker Cases the local companies in Boston which distributed the news within that city had absolute control over the information after it reached Boston, had actual physical possession of the reports from the New York Stock Exchange, and complete control over their distribution and

sale within the city of Boston. The local companies solicited the customers and contracted directly with them for the ticker service. In that case (unlike the present case) the rates charged customers were fixed by the local companies. Yet all those circumstances did not change the character of the business transacted from interstate to intrastate. Neither can circumstances less significant affect the interstate character of the business in this case.

Of the claim of the Missouri defendants that they have done nothing to warrant an injunction, the following finding of Judge Booth is conclusive against them (Rec., p. 618):

"The Missouri Commission has made no orders fixing general rates for the sale of gas by the receiver within the state of Missouri, as was the case in regard to the Kansas defendants. But the Missouri Commission has done certain specific acts; amongst others it has suspended schedules of rates which were agreed upon by the receiver and the distributing companies and has threatened the distributing companies with further action against them if they should undertake to enforce those rates. It has also taken the position through its counsel in open court that it would recognize no rates as valid unless those rates were first submitted to the Commission for its approval and approved by it. Not only that it has taken jurisdiction over complaints by the distributing companies and in some instances I think by the cities as to rates, but instead of proceeding to hearing upon these complaints it has suspended the hearings from time to time without attempting to

reach any definite conclusion. It has attempted by order made in August, 1916, to establish a new rate for natural gas in Kansas City, Missouri. In these various acts the defendant cities have severally participated. The result of all this is that the receiver is seriously hampered in his business, and the distributing companies are also seriously hampered in their business in attempting to put in a schedule of rates for the various cities in Missouri. In my judgment these acts on the part of the Missouri Commission constitute an attempt to directly interfere with and directly burden interstate commerce. I am likewise of the opinion that they also in effect constitute the taking of the property of the receiver without due process of law."

The decree as rendered against the Missouri defendants is right and should be affirmed.

**The plaintiff receiver has never adopted the contracts with distributing companies and the same are not binding upon him.**

The District Court of Montgomery County, Kansas, determined that the contracts of the distributing companies were not binding upon the receiver. (Rec., p. 548.) The Wyandotte County Gas Company, one of the appellants in this case, appealed from that decision and judgment to the Supreme Court of the State of Kansas. The Supreme Court of the State of Kansas in *State v. Gas Company*, 102 Kan. 712, dismissed the appeal, but in doing so stated: "There is no substantial difference between the views herein expressed and the order made by the District Court on October 16, 1916." The judgment of the District Court of Montgomery County is therefore binding on the Wyandotte County Gas Company and is *res adjudicata*.

The situation in regard to these supply contracts cannot be better stated than as set forth by Judge Booth in his opinion, reported in 245 Fed. l. c. 954. Judge Booth says:

"Now as to the second main question, namely the question of the supply contracts. These supply contracts were entered into by the original parties during the years from 1905 to 1908 or 1909 and perhaps later. As far as I have been able to examine them they all contain one clause which is very similar, and I do not know but it is identical in its wording: 'However, as the production of

gas from the wells and the conveying of it from long distances is subject to accidents and interruptions and failures, the party of the first part does not under this contract undertake to furnish the parties of the second part with an uninterrupted supply of gas for the period named herein, but only to furnish such supply for such a period of time as the wells and pipe lines of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying. And it is expressly understood and agreed by the parties of the second part that the party of the first part shall not be liable for any loss, damage or injury that may result either directly or indirectly from such shortages or interruptions, but said party of the first part agrees to use diligence to supply the parties of the second part with a constant and sufficient supply of merchantable gas for all consumers.'

All the contracts which I have examined contain a provision similar to that quoted. They all contain, also, or at least those which I have examined contain certain provisions restrictive on the parties to the contract; restrictive as to the right of the parties furnishing the gas to furnish it to any other person or corporation doing business in the zone or district specified; and restrictive as against the distributing companies to prevent them from purchasing gas from any other person or corporation than the person named in the contract who is furnishing the gas, except under certain conditions.

In April, 1912, the Supreme Court of Kansas had occasion to review these contracts, and while there is a difference amongst counsel as to just what the judgment of that court

was in its effect, I think it must be conceded by all that the Supreme Court of the State of Kansas took the view that there were certain clauses at least in those contracts that were contrary to the statutes of the State of Kansas, and also contrary to public policy. It may very well be doubted whether those same restrictive clauses were not also a violation of the statutes of the United States against trusts and monopolies.

*State v. Kansas Natural Gas Co.*, No. 17977.

*Montague & Co. v. Lowry*, 193 U. S. 38.

With full knowledge of these facts the United States District Court of the State of Kansas made an order in October, 1912, touching these contracts, and the gist of that order was that those contracts should not be binding upon the receiver except upon further express order of the court. The Circuit Court of Appeals for this Circuit in a decision in a case arising out of this general gas controversy upon a contract, not a supply contract, but a lease contract, also held that that contract was not binding upon the receiver and took occasion in its decision to refer to the above mentioned express order of the United States District Court of Kansas. (*K. C. Pipe Line Co. v. Fidelity Co.*, 217 Fed. 187.) On two separate occasions the District Court of Montgomery County, Kansas, has held that these supply contracts are not merely not binding upon the receiver but invalid in their inception, as being against the statutes of the State of Kansas, and being also against the statutes of the United States as well as against public policy.

There never has been any formal adoption by the receiver of these supply contracts. In such case it is not the law that a contract shall be binding upon the receiver until it is disavowed by him, but the law is that it is not binding upon the receiver until it is accepted by him; and while it is true that ordinarily the law requires the receiver to indicate within a reasonable time whether or not he will accept a contract, in this particular case the court relieved the receiver of any necessity for taking any action by expressly ordering that the contract should not be binding upon the receiver until the court by its order made it binding. It was not necessary for the receiver to take any action on his part. If the other parties to the contract wished to have these contracts made binding upon the receiver the court was open to them to make an application, and upon that application the court would have made such an order as was deemed necessary. No such action was ever taken and the order of the court made in October, 1912, still stands that these contracts are not binding upon the receiver until the further orders of the court may make them so."

We can add nothing to the concise and able exposition of the law as set forth by Judge Booth. We feel his pronouncement is sound and should be affirmed.

**The finding of the lower court that the 28-cent rate fixed by the Public Utilities Commission of Kansas is not reasonable or compensatory is sustained by the evidence.**

The three judges heard evidence on this feature of the case for ten days before granting the preliminary injunction. No appeal has ever been taken from their order. The lower court on the hearing on the application for the permanent injunction against the 28-cent rate, not only considered the evidence taken by the three judges, but also heard additional testimony presented for over twenty days.

It is unnecessary to abstract or specifically refer to this evidence. It is only necessary to refer to the opinion of the three judges (Rec., p. 298) and to the exhaustive discussion of the evidence contained in Judge Booth's opinion (Rec., p. 564) to show that the evidence fully sustains the contention of the receiver that the 28-cent rate was and is unreasonable and non-compensatory. The Supreme Court of Kansas on application by the Public Utilities Commission of Kansas refused to grant a writ of mandamus to put the first 28-cent rate into effect, calling attention to the fact that the Commission had failed to provide sufficient funds to meet the requirements of the receiver. (96 Kan. 372, l. c. 387.)

### **Conclusion.**

Under Section 56 of the Judicial Code, the United States District Court for the District of Kansas had authority to protect the property in its possession by issuing process to the Missouri defendants in the State of Missouri. It is elementary that the court which first draws to itself possession of the *res* has the right to protect that possession from interference by every one else. The public officers of the State of Missouri were and are interfering with that possession and were and are endeavoring to confiscate the property in the hands of the court. The court had adequate grounds for jurisdiction over both the Kansas and Missouri defendants. It had the actual and full possession of all the property of The Kansas Natural Gas Company within the states of Missouri, Kansas and Oklahoma at the time of the entry of decrees from which these appeals are taken. Prior to the entry of these decrees the District Court of Montgomery County, Kansas, had dismissed the suit in that court and had surrendered all the property in its actual possession to the United States District Court for the District of Kansas. The question of interstate commerce alone was sufficient to give the District Court jurisdiction of this suit. Under the Kansas statute it was a competent court to review and determine the reasonableness of the 28-cent rate prescribed by the Public Utilities Commission of Kansas. It has determined such rate to be unreasonable and this fact alone is sufficient to war-

rant the affirmance of the decree of July 5, 1917.

A controlling question in this case is whether or not the business conducted by the receiver is interstate commerce of a national character. That the transportation of natural gas by pipe lines in interstate commerce is of a national character has already been determined by this Court, when the gathering lines and main trunk lines of the present system were under consideration in *West v. Kansas Natural Gas Company, supra*. The transportation of natural gas by pipe lines is the only practical method of transporting natural gas. This Court has determined that the natural gas when started on its way to consumers in Kansas and Missouri from the fields in Oklahoma is an article of trade in interstate commerce and subject to the commerce clause of the Federal Constitution. Being interstate commerce in its inception, it does not cease to be such until there is a delivery to the consumers for whom it was intended at the beginning of its journey. Neither plurality of carriers nor delay in transmission nor incidental storage nor the use of public franchises nor the lack of privity of contract between ultimate consumer and shipper can destroy the interstate character of the transaction which has once attached. Local incidental service, either at the initial point or at the end of the journey, does not end the interstate character of the commerce. The criterion is: Is the transaction such as is usual and customary in interstate transportation of such an article of commerce? If so, the entire journey from point of origin to final destination comes within the provisions of the interstate commerce

clause of the Constitution of the United States. If, on the other hand, there are storages, interruptions, commingling of property, not usual, then where such unusual occurrences happen the character of interstate commerce is lost. The drawing off of oil from the tank car at Columbia, Tennessee, for sale at that point made neither the sale at Columbia nor the sale of the balance when transported to Mount Pleasant, Tennessee, intrastate commerce, in the Western Oil Refining Company case. So the drawing off of gas at Independence, Kansas, or at any point within the State of Kansas, on the journey of the gas from Oklahoma to the ultimate consumers in Kansas and Missouri does not take from the transaction its interstate character.

Whether the local distributing companies be agents of the plaintiff receiver, as determined by the Supreme Court of the State of Kansas, or connecting carriers, the natural gas continues in its interstate journey through their plants to the consumers' burner tips an article of interstate commerce. The natural gas transported by the plaintiff receiver from Oklahoma to the consumers' burner tips in Kansas and Missouri travels as swiftly and continuously as science can provide.

Under the doctrine announced in the Ticker Cases, *supra*, the commerce conducted by the plaintiff receiver is entitled to the full protection of the interstate commerce clause of the Constitution of the United States. No better example of the wisdom of this clause can be found than in the present lamentable controversy. The Public Utilities Commission of the State of Kansas has

sought to compel the plaintiff receiver to observe a 28-cent rate which has been declared confiscatory and unreasonably low by the Supreme Court of the State of Kansas and by the United States District Court for the District of Kansas on two different occasions. The Missouri Public Service Commission, under threats of the imposition of enormous penalties provided by the law of Missouri, has endeavored to compel the plaintiff receiver to observe rates which Judge Booth, after a hearing consuming weeks of time and thousands of pages of testimony, has found confiscatory and unreasonably low. If the people of the forty-five cities and towns served by the present system are to get any natural gas at all and thereby conserve the coal in these war times for essential industries and avoid burdening the railroads with the unnecessary transportation of coal, the plaintiff receiver in the conduct of his business must be relieved from the domination of a utilities commission which insists upon a rate three times declared to be unreasonably low.

He must be freed from the control of commissions, each seeking for the people of its own state rates so unreasonably low as to cast a burden not only upon the receiver but also upon the consumers in the neighboring state. To subject the conduct of the receiver's business in three states to the orders of different commissions which could have in any event jurisdiction over only a part of the consumers and no authority whatever over the source of the supply, means the destruction of this great system of pipe lines for the transportation of natural gas in interstate commerce.

We believe this Court will view the question as it did in the Ticker Cases. We submit that the decrees of the United States District Court for the District of Kansas should be affirmed.

Respectfully submitted,

JOHN H. ATWOOD,  
ROBERT STONE,  
GEORGE T. McDERMOTT,  
AUSTIN M. COWAN,  
CHESTER I. LONG,

*Solicitors for John M. Landon, Managing Receiver of Kansas Natural Gas Company, Appellee.*

CHARLES BLOOD SMITH,  
*Solicitor for Fidelity Title & Trust Company, Appellee.*

R. A. BROWN,  
T. S. SALATHIEL,  
*Solicitors for Kansas Natural Gas Company, Appellee.*

JOHN J. JONES,  
*Solicitor for George F. Sharitt, Receiver of Kansas Natural Gas Company, Appellee.*

**APPENDIX.**

In the Supreme Court of the State of Kansas.  
Tuesday, October 16, 1917.

The State of Kansas, ex rel J. L.

Bristow, etc. et al., Plaintiff,

vs.

No. 21053

John M. Landon, et al. Rec. etc.,

Defendants.

**Journal Entry of Modification.**

In the opinion herein it was ordered that unless within a time fixed the consent of the Public Utilities Commission should be obtained to depart from the contract, the writ prayed for should issue requiring compliance with such contract until it should be duly and lawfully set aside or superseded. It now appearing by supplemental answer and return that such contract has in effect been set aside and superseded by the Federal Court, it is ordered that the writ prayed for be denied.

State of Kansas, Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true and correct copy of the Journal Entry of modification in the above entitled case as the same remains of record at page 239 of Journal "XX" of this Court.

Witness my hand and the seal of the Supreme Court of Kansas hereto affixed at my office in the city of Topeka, this 9th day of September, A. D., 1918.

(SEAL.)

D. A. VALENTINE,

*Clerk Supreme Court.*